123-375

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1101. 714

J. D. COX, PLAINTIFF IN ERROR,

vs.

THE WESTERN LAND AND CATTLE COMPANY (LIMITED).

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 9, 1886.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for said northern district of Illinois, on Monday, the twenty-fourth day of May, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and tenth year.

WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

THE WESTERN LAND AND CATTLE COMPANY, Limited,

vs.

JAMES W. PLUMB, JAMES W. MOAD, JAMES D. COX, THE UNION STOCK-YARDS AND TRANSIT COMPANY, and JESSE SHERWOOD.

Replevin.

Be it remembered that on the twenty-second day of June, 1885, came the plaintiff, by its attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, its *præcipe* for a summons, and also at the same time filed its bond for costs in said entitled cause; which said *præcipe* and bond are, respectively, in the words and figures following, to wit:

2 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

In the Circuit Court of the United States for said District, to the July Term, 1885.

THE WESTERN LAND AND CATTLE COMPANY (Limited)

v.

J. W. PLUMB, —— MODE, THE UNION STOCK-YARDS AND TRANSIT COMPANY, ROBERT STRAHORN, FRANK R. BAKER, and JESSE SHERWOOD.

Replevin.

The clerk will please issue a writ as above, and oblige, &c.—

McCOY, POPE & McCOY,
Plaintiff's Attorneys.

To Wm. H. Bradley, Esq., clerk.

(Endorsed:) Filed June 22, 1885. W. H. Bradley, clerk.

2½ UNITED STATES OF AMERICA, }
Northern District of Illinois, } ss:

Circuit Court. July Term, A. D. 1885.

WESTERN LAND AND CATTLE COMPANY (Limited)
vs.
J. W. PLUMB *et al.*

In replevin.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court; and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by it we hereby agree and stipulate that execution may issue against our property for any costs taxed against it.

Dated this 22d day of June, A. D. 1885.

McCOY, POPE & McCOY.

(Endorsed:) Filed June 22, 1886. W. H. Bradley, clerk.

3 On the same day, to wit, on the twenty-second day of June, 1885, came James Alexander Forbes and filed in said clerk's office his affidavit in said entitled cause; which said affidavit is in the words and figures following, to wit:

4 *Affidavit for Replevin.*

NORTHERN DISTRICT OF ILLINOIS, }
State of Illinois, County of Cook, } ss:

James Alexander Forbes, being first duly sworn, says that he is the agent and managing director of the Western Land and Cattle Company (Limited), a corporation and citizen of the United Kingdom of Great Britain, Scotland, and Ireland; that said corporation is the owner of and is now lawfully entitled to the possession of the following goods and chattels, viz., one hundred and thirty-five head of Colorado-Texas steers, branded "101," and other brands.

That said goods and chattels are of the value of six thousand dollars ($6,000).

That on the twentieth day of June, A. D. 1885, J. W. Plumb and James W. Mode, who are citizens of the State of Missouri, the Union Stock-Yards and Transit Company, a corporation of the State of Illinois, and Robert Strahorn, Frank A. Baker, and Jesse Sherwood, who are citizens of the State of Illinois, wrongfully took and now wrongfully detain the said goods and chattels from the
5 said Western Land and Cattle Company (Limited), and the said goods and chattels have not been taken for any tax, assessment, or fine levied by virtue of any law of this State, nor seized under any execution or attachment, nor held by virtue of any writ of replevin against the said Western Land and Cattle Company (Limited).

J. A. FORBES.

Subscribed and sworn to before me this 22d day of June, A. D. 1885.

[SEAL.] CHAS. B. McCOY,
Notary Public, Cook County, Illinois.

(Endorsed:) Filed June 22, 1885. W. H. Bradley, clerk.

On the same to-day, to wit, on the 22nd day of June, 1885, there issued out of said clerk's office a writ of replevin in said entitled cause; which said writ, together with the return of the marshal thereto attached are in the words and figures following, to wit:

6 Circuit Court of the United States of America, Northern District of Illinois, *ss:*

The United States of America to the marshal of the northern district of Illinois, Greeting:

Whereas The Western Land & Cattle Company (Limited), plaintiff, complains that James W. Plumb, James W. Mode, Union Stock-Yards & Transit Company, Robert Strahorn, Frank A. Baker, and Jesse Sherwood, defendants, unlawfully and wrongfully have taken and do detain the following described goods and chattels, to wit: One hundred and thirty-five head of Colorado-Texas steers, branded "101," and other brands, to the value of six thousand dollars and — cents;

Therefore we command you that if the said plaintiff shall give you bond, with good and sufficient security in double the value of the said goods and chattels, as required by law, to prosecute its suit in this behalf to effect and without delay, and to make return of the said goods and chattels, if return thereof shall be awarded, and to save and keep you harmless in replevying said goods and chattels, you cause the said goods and chattels to be replevied and delivered to said plaintiff without delay; and also that you summon the said defendant to be and appear before the circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at the court-house, in the city of Chicago, in said district, on the first Monday of July next, to answer said plaintiff in the premises.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same, together with the bond which you shall have taken from the said plaintiff as before commanded, before executing this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America at Chicago aforesaid, this 22d day of June, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the 109th year.

[SEAL.] W. H. BRADLEY, *Clerk.*

7 *Special Deputy's Return.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Know all men by these presents that I have appointed, and by these presents do appoint, George N. Jones my true and lawful deputy to execute the annexed writ, Western Land and Cattle Company (Limited) *vs.* J. W. Plumb, and to make return of the execution thereof according to law.

A. M. JONES, [SEAL.]
U. S. Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit, by reading the same to and in the presence and hearing of G. Titus Williams, sup't of the Union Stock-Yards and Transit Co., on the 22d day of June, A. D. 1885, and by reading the same to & in the presence & hearing of James W. Plumb and Jesse Sherwood, on the 23d day of June, A. D. 1885. I also replevied the said chattels, to wit, one hundred and thirty-five head of Colorado-Texas steers, branded "101," and other brands, and delivered them to said plaintiff, to wit, to The Western Land and Cattle Company, on the 22d day of June, A. D. 1885, and I return this writ and bond
8 with same. I did not serve James W. Mode, Robert Strahorn, and Frank A. Baker, the other defendants therein named, being unable to find them within my district.

A. M. JONES,
United States Marshal,
By GEO. N. JONES,
Special Deputy.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

George N. Jones, being duly sworn, deposes and says that he served the annexed writ, as stated in the foregoing return, and that the expense returned by him, in addition to the fees, was actually incurred, and that the same is according to law.

GEO. N. JONES.

Subscribed and sworn to before me this 6th day of July, A. D. 1885.

[SEAL.] SAM'L C. HAYES,
Notary Public.

Received of A. M. Jones, within-named United States marshal, the within-described one hundred and thirty-five head of Colorado-Texas steers.
9 Dated Union Stock-Yards, June 22, A. D. 1885.

WESTERN LAND & CATTLE CO.,
By J. A. FORBES, *Gen. Manager.*

(Endorsed:) Filed July 6, 1886. W. H. Bradley, clerk.

10 Afterwards, to wit, on the second day of July, in the adjourned May term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE WESTERN LAND & CATTLE CO., Limited,
vs.
J. W. PLUMB *et al.*

Replevin.

Now come the parties, by their attorneys, and, on motion of the defendants, by their attorney, the plaintiff is hereby ruled to file its declaration herein by the thirteenth instant; and, on motion of the plaintiff, by its attorney, it is ordered that this cause be dismissed as to the defendant, Frank A. Baker, and leave is given the plaintiff to amend the papers by changing the name of James W. Mode to James W. Moad, to make J. W. Cox a party defendant herein, and to file a new replevin bond with the marshal in place of the bond heretofore given him in this cause.

Afterwards, to wit, on the third day of July, 1885, came the plaintiffs, by their attorneys, and filed in said clerk's office their declaration in said entitled cause; which said declaration is in the words and figures following, to wit:

11 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit of the United States for said District. July Term, A. D. 1885.

THE WESTERN LAND AND CATTLE COMPANY (Limited)
v.
JAMES W. PLUMB, JAMES W. MODE, JAMES D. COX, THE UNION Stock-Yards and Transit Company, Robert Strahorn, and Jesse Sherwood.

Replevin, $6,000.00.

James W. Plumb, James W. Moad, and James D. Cox, who are citizens and residents of the State of Missouri, and The Union Stock-Yards and Transit Company, a corporation organized under the laws of the State of Illinois, and having its office and principal place of business in said district, and Robert Strahorn and Jesse Sherwood, who are citizens of the State of Illinois, were summoned to answer The Western Land and Cattle Company (Limited),
12 a corporation organized under the laws of the Kingdom of Great Britain, Scotland, and Ireland, and a subject of said Kingdom, of a plea wherefore they took the goods and chattels of the said plaintiff and wrongfully detained the same until, etc.

And thereupon the said plaintiff, by McCoy, Pope & McCoy, its attorneys, complains: For that the said defendants, on the twentieth

day of June, in the year A. D. 1885, at the Union stock-yards, in the district aforesaid, took the goods and chattels, to wit, one hundred and thirty head of Colorado-Texas steers, branded "101," and other brands, of the said plaintiff, of the value of six thousand dollars, and unjustly detained the same until, etc.

And also wherefore the said defendants wrongfully detained the goods and chattels of the said plaintiff until, &c.; for that the said defendants, on the 20th day of June, in the year A. D. 1885, at the Union stock-yards, in the district aforesaid, other the goods and chattels of the said plaintiff, to wit, one hundred and thirty-
13 five head of Colorodo-Texas steers, branded "101," and other brands, of the value of six thousand dollars, wrongfully detained until, &c.

And also for that whereas the said plaintiff, on the day last aforesaid, in the district aforesaid, was lawfully possessed, as of its own property, of certain other goods and chattels, to wit, one hundred and thirty-five head of Colorado-Texas steers, branded "101," and other brands, of the value of six thousand dollars; and, being so possessed thereof, the said plaintiff afterwards, to wit, on the same day, there came to the possession of the said defendants by finding, yet the said defendants, well knowing the last-mentioned goods and chattels to be the property of the said plaintiff, have not as yet delivered the same or any part thereof, or any or either of them, to the said plaintiff, though often thereto requested, but have hitherto refused so to do; and afterwards, to wit, on the same day, there converted and disposed of the last-mentioned goods and chattels to their own use.

14 Wherefore the said plaintiff says that it has been injured, and has sustained damages to the amount of six thousand dollars, and therefore it brings its suit, etc.

McCOY, POPE, AND McCOY,
Plaintiff's Att'ys.

(Endorsed:) Filed July 3d, 1885. W. H. Bradley, cl'k.

On the same day, to wit, on the third day of July, 1885, came Charles B. McCoy and filed in said clerk's office his affidavit in said entitled cause; which said affidavit is in the words and figures following, to wit:

15 *Affidavit for Replevin.*

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for said District, to the July Term, A. D. 1885.

THE WESTERN LAND AND CATTLE COMPANY (Limited)
v.
JAMES W. PLUMB, JAMES W. MOAD, JAMES D. COX, THE UNION Stock-Yards and Transit Company, Robert Strahorn, and Jesse Sherwood.

Replevin; damages, $6,000.00.

Charles B. McCoy, one of the attorneys and an agent of said plaintiff, being first duly sworn, says that James W. Moad and James D. Cox, two of the above-named defendants, are not residents of said district nor of the State of Illinois, but are residents
16 of the State of Missouri, and have not been found or served with process in said district, and that, as affiant is credibly informed and verily believes, the place of residence of said defendant, James W. Moad, is at Black Oak, in Caldwell county, in said State of Missouri, and the place *and* residence of said James D. Cox is at Kingston, in Caldwell county, in said State of Missouri.

And further says not.

CHARLES B. McCOY.

Subscribed and sworn to before me this 2d day of July, A. D. 1885.

CHARLES E. POPE,
Notary Public.

(Endorsed:) Filed July 3d, 1885. W. H. Bradley, clerk.

Afterwards, to wit, on the thirteenth day of August, 1885, came J. W. Plumb and J. D. Cox, by their attorney, and filed in said clerk's office their pleas in said entitled cause; which said pleas are in the words and figures following, to wit:

17 *Pleas.*

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for said District, of the July Term, 1885.

THE WESTERN LAND AND CATTLE CO., Limited, Plaintiffs.
vs.
JAMES W. PLUMB *et al.*, Defendants.

And the defendant, James W. Plumb, by R. A. Childs, his attorney, comes and defends, &c., when, &c., and says that the said first

count of the said declaration and the matters therein contained in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain its aforesaid action, and that he, the said defendant, is not bound by law to answer the same, and this he is ready to verify. Wherefore, for want of a sufficient first count in the said declaration in this behalf, the defendant prays judgment, and that the plaintiff may be barred from maintaining its aforesaid action, &c.

And the defendant shows to the court here the following
18 causes of demurrer to the first count of the said declaration—that is to say—

That the said count is double, for that it presents two causes of action, alleging at once the wrongful taking and the wrongful detaining of the cattle, goods, and chattels therein described; and also that the said first count of the said declaration is in other respects uncertain, informal, and insufficient.

By R. A. CHILDS, *His Att'y.*

Second Plea.

And as to the second count of the said declaration the said defendant says that he did not wrongfully detain the said cattle, goods and chattels in the said second count mentioned or any or either of them, or any part thereof, in manner and form as the plaintiff has above in that count complained against him, and for this the said defendant puts himself upon the country, &c.

By R. A. CHILDS,
His Attorney.

And the said plaintiff doth the like.

By McCOY, POPE & McCOY,
Plaintiff's Attorneys.

19 *Third Plea.*

And, for a further plea in this behalf, the defendant says that the plaintff ought not to have its aforesaid action against him, the said defendant, because he says that the said cattle, goods, and chattels in the said declaration mentioned, to the extent and number of fifty-six head thereof, at the said time when, &c., were the property of him, the said defendant, and not of the plaintiff, as by the said declaration is above supposed; and that the said cattle, goods, and chattels in the said declaration mentioned, to the extent and number of seventy-nine head thereof, at the said time when, &c., were the property of one James D. Cox and not of the plaintiff, as by the above declaration is supposed, and this the said defendant is ready to verify; whereof he prays judgment, &c. He also prays a return of the said fifty-six head of the said cattle, goods, and chattels to him, and seventy-nine (79) head to said Cox, together with his costs in this behalf, according to the form of the statute in such case made and provided, to be adjudged to him, &c.

By R. A. CHILDS,
His Attorney.

20 *Fourth Plea.*

And, as to the third count of the said declaration, the defendant says that he is not guilty of the supposed grievances above in the said third count laid to his charge, or any or either of them, in manner and form as complainant has above in that count complained against him, and of this the defendant puts himself upon the country, &c.

By R. A. CHILDS,
His Att'y.

And the said plaintiff doth the like.

By McCOY, POPE & McCOY,
Plaintiff's Attorneys.

Endorsed: Filed Aug. 13, 1885. Wm. H. Bradley, cl'k.

21 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for said District, of the July Term, 1885.

THE WESTERN LAND & CATTLE CO., Lt'd',

vs.

JAMES W. PLUMB, JAMES W. MOAD, JAMES D. COX, THE UNION Stock-Yards and Transit Company, Robert Strahorn, and Jesse Sherwood, Defendants.

And the defendant, James D. Cox, by R. A. Childs, his attorney, comes and defends, &c., when, &c., and says that the said first count of the said declaration and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain its aforesaid action, and that he, the said defendant, is not bound by law to answer the same, and this he is ready to verify. Wherefore, for want of a sufficient first count in said declaration in this behalf, the defendant prays judgment, and that the plaintiff may be barred from maintaining its aforesaid action, &c. And the defendant shows to the court
22 here the following causes of demurrer to the first count of the said declaration—that is to say:

That the said count is double, for that it presents two causes of action, alleging at once the wrongful taking and the wrongful detaining of the cattle, goods, and chattels therein described; and also that the said first count of the said declaration is in other respects uncertain, informal, and insufficient.

By R. A. CHILDS,
His Att'y.

Second Plea.

And as to the second count of the said declaration the said defendant says that he did not wrongfully detain the said cattle, goods, and chattels in the said second count mentioned, or any or either of

them, or any part thereof, in manner and form as the plaintiff has above in that count complained against him, and of this the said defendant puts himself upon the country, &c.

By R. A. CHILDS,
His Att'y.

And the said plaintiff doth the like.

By McCOY, POPE & McCOY,
Plaintiff's Attorneys.

Third Plea.

23 And for a further plea in this behalf the defendant says that the plaintiff ought not to have its aforesaid action against him, the said defendant, because he says that the said cattle, goods, and chattels in the said declaration mentioned, to the extent and number of seventy-nine (79) head thereof, at the said time, when, &c., were the property of him, the said defendant, and not of the plaintiff, as by the said declaration is above supposed; and that the said cattle, goods, and chattels in the said declaration mentioned, to the extent and number of fifty-six (56) head thereof, at the said time, when, &c., were the property of one James W. Plumb, and not of the plaintiff, as by the said declaration is above supposed, and this the said defendant is ready to verify; whereof he prays judgment, &c. He also prays a return of the said fifty-six (56) head of cattle, goods, chattels — said Plumb, and also a return of the said seventy-nine (79) head of cattle, goods, and chattels to the said James D. Cox, together with his costs in this behalf, according to the form of the statute in such case made and provided, to be adjudged to him, &c.

By R. A. CHILDS,
His Attorney.

24 *Fourth Plea.*

As to the third count of the said declaration the defendant says that he is not guilty of the supposed grievances above in the said third count laid to his charge, or any or either of them, in manner and form as complainant has above in that count complained against him, and of this the defendant puts himself upon the country, &c.

By R. A. CHILDS,
His Att'y.

And the said plaintiff doth the like.

By McCOY, POPE & McCOY,
Plaintiff's Attorneys.

(Endorsed:) Filed Aug. 13, 1885. Wm. H. Bradley, cl'k.

25 Afterwards, to wit, on the nineteenth day of October, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE WESTERN LAND AND CATTLE CO. *vs.* J. W. PLUMB *et al.*

Replevin.

Now come the parties, by their attorneys, and now comes on to be heard the demurrer of the defendant to the declaration therein; and, after hearing the arguments of counsel, the court sustains said demurrer with leave to the plaintiff to amend his declaration *instanter*, and the defendants are hereby ruled to plead to the declaration, as amended, within five days.

On the same say, to wit, on the nineteenth day of October, 1885, came the defendant, James D. Cox, by his attorney, and filed in said clerk's office his pleas to the amended declaration in said entitled cause; which said pleas are in the words and figures following, to wit:

26 *Pleas.*

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois. Oct. Term, 1885.

THE WESTERN LAND & CATTLE CO. (Limited), Plaintiff,
vs.
JAMES W. PLUMB, JAMES W. MOAD, JAMES D. COX, THE UNION STOCK-YARDS and Transit Co., Robert Strahorn, and Jesse Sherwood, Defendants.

And the said defendant, James D. Cox, — Robert A. Childs, his attorney, by way of plea to the said amended first count of said declaration, comes and defends the wrong and injury, when, &c., and says that he did not take the said cattle, goods, and chattels in the said declaration mentioned, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof in said first count complained against him.

And of this the said defendant puts himself upon the country.

By R. A. CHILDS,
His Attorney.

27 And the said plaintiff doth the like.

By McCOY, POPE & McCOY,
Plaintiff's Attorneys.

And, for a further plea in this behalf, by leave of the court here first had and obtained, the said defendant, James D. Cox, says that the said plaintiff ought not to have and maintain his aforesaid action thereof against him, the said defendant, because he says that there is no such corporation as the Western Land and Cattle Company, Limited, created, organized, or existing as by the said declaration is above supposed, and this the said defendant is ready to verify.

Wherefore he prays judgment if the said plaintiff ought to have or maintain its aforesaid action against him, the said defendant.

By R. A. CHILDS,
His Attorney.

Endorsed: Filed Oct. 19, 1885. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 28th of April, 1885, came the plaintiff, by its attorneys, and filed in said clerk's office its replication to the pleas of the defendants in said entitled cause; which said replication is in the words and figures following, to wit:

28 *Replication.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

In the Circuit Court of the United States for said District.

WESTERN LAND AND CATTLE COMPANY (Limited)
v.
JAMES W. PLUMB, JAMES W. MOAD, JAMES D. COX, *et al.*

Replevin.

And now comes the said plaintiff, by McCoy, Pope and McCoy, its attorneys, and as to the said pleas of the said defendant, James D. Cox, on August 13, 1885, second and fourth pleaded, and his plea to the amended first count of plaintiff's declaration on October 19th, 1885, pleaded, and as to the pleas of the defendant, James W. Plumb, second and fourth above pleaded, and whereof said defendants
29 have put themselves upon the country, doth the like; and as to the second plea of said defendant, James D. Cox, on October 19th, 1885, pleaded, said plaintiff says that it, the plaintiff, ought not, by reason of anything in that plea alleged, to be barred from having its aforesaid action, because it says that there is such a corporation as the Western Land and Cattle Company (Limited) created, organized, and existing, as by the said declaration is above supposed, and of this the plaintiff puts itself upon the country, &c.

By McCOY, POPE & McCOY,
Plaintiff's Attorneys.

And as to the plea of the said defendant, James D. Cox, by him on August 13th, 1885, third above pleaded, the plaintiff saith that it, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having its aforesaid action, because it says that the said goods and chattels in the said declaration mentioned at the said time when, &c., were the property of it, the plaintiff, and not of the defendant, as he has in that plea alleged, and
30 this the plaintiff prays may be inquired of by the country, etc.

By McCOY, POPE & McCOY,
Plaintiff's Attorneys.

And as to the plea of the said defendant, James W. Plumb, on August 13th, 1885, third above pleaded, the plaintiff saith that it, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having its aforesaid action, because it says that the said goods and chattels in the said declaration mentioned at the said time when, etc., were the property of it, the plaintiff, and not of the defendant, as he has in that plea alleged, and this the plaintiff prays may be inquired of by the country, &c.

By McCOY, POPE & McCOY,
Plaintiff's Attorneys.

(Endorsed:) Filed April 28, 1886. Wm. H. Bradley, clerk.

31 Afterwards, to wit, on the twenty-ninth day of April, in the adjourned March term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge is the following entry, to wit:

Order.

THE WESTERN LAND AND CATTLE COMPANY, Limited,
vs.
JAMES W. PLUMB, JAMES W. MOAD, JAMES D. COX, THE UNION STOCK-YARDS AND TRANSIT COMPANY, ROBERT STRAHORN, JESSE SHERWOOD.

Replevin.

Now comes the plaintiff, by Mess. McCoy, Pope and McCoy, its attorneys, and now comes also the defendant, James D. Cox, by R. A. Childs, Esq., his attorney, and upon issue joined herein upon the plea of said defendant, James D. Cox, by agreement of the parties, as per stipulation filed, they waive the intervention of a jury, and for trial put themselves upon the court; and after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

32 Afterwards, to wit, on the thirtieth day of April, in the adjourned March term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry to wit:

Order.

THE WESTERN LAND AND CATTLE COMPANY, Limited,
vs.
JAMES W. PLUMB, JAMES D. COX, *et al.*

Replevin.

Now come again the parties, by their attorneys, and after hearing the concluding evidence and the arguments of the counsel upon the issues herein, the plaintiff, by its attorney, moves the court for

default against the defendants, James W. Moad, The Union Stock-Yards and Transit Company, and Jesse Sherwood; and it appearing to the court that said last-named three defendants had been duly served with process and have failed to plead, and they being now ruled to plead *instanter*, and they failing to plead or answer the rule, and said three defendants being now each three times solemnly called — come, but make default; it is thereupon considered by the court that their defaults be entered; and, on motion of the plaintiff, by its attorney, it is ordered by the court that this cause be
33 dismissed as to the defendant Robert Strahorn. And thereupon the court takes this cause under advisement.

Afterwards, to wit, on the twenty-fourth day of May, 1886, there was filed in said clerk's office the opinion of Judge Blodgett in said entitled cause; which said opinion is in the words and figures following, to wit:

34 WESTERN LAND & CATTLE COMPANY (Limited)
vs.
J. W. PLUMB *et al.*

BLODGETT, *J.*:

This suit was tried before the court without the intervention of a jury.

It is an action of replevin involving the ownership and right to the possession of seventy-nine head of beef cattle.

The material facts, as they appear from the proof, are that on or about the 8th of November, 1884, the plaintiff was the owner and in possession of 150 head of beef cattle, designated as Colorado steers, and on that day entered into a contract with one J. W. Moad by which Moad was to take the cattle to his farm in Caldwell and Ray counties, Mo., and there to properly feed, fatten, and care for them for the purpose of their being profitably marketed by plaintiff; that Moad should be liable for all losses of such cattle from death, disease, escape, or theft at an agreed value of $44.86 per head; that the time of feeding should extend to the first of June, 1885; that the cattle were to be sold or shipped for sale by plaintiff, and that Moad was to receive as full compensation for his care and feeding of the cattle all moneys realized by plaintiff on the sale of the cattle over the sum of $44.86 per head, after deducting all costs and expenses of shipment and sale, and Moad expressly waived all lien on the cattle, either as an agister — of any other character.

35 In removing the cattle from the vicinity of Kansas City, where they were at the time the contract was made, to Moad's farm eight head escaped and were subsequently recovered and returned to Kansas City, where they were sold with the knowledge of Moad and proceeds paid to plaintiff. Seven head were either disposed of by Moad or died, so that on the 19th of June there remained in Moad's possession 135 head, and on that day he drove them from his farm in Ray county to Breckenridge, a railroad station a few miles distant, and there delivered the cattle to one J.

W. Plumb; fifty-six head of them, it was claimed, were sold to Plumb and the remainder, seventy-nine head, were delivered to Plumb as agent of J. D. Cox.

Plumb shipped the cattle on the night of the 19th by railroad for Chicago, and plaintiff, being notified of the removal of the cattle, caused them to be replevied very soon after their arrival at the stock-yards in this city; a settlement has since been made between plaintiff and Plumb in regard to the fifty-six head which Plumb claimed to have bought of Moad, and the contention left for trial is only in respect to plaintiff's ownership of the seventy-nine head, which it is claimed had been sold by Moad to J. D. Cox or to the Caldwell County Bank of Kingston, Mo., of which Cox was the president and active manager. It also appears that at the time the contract between plaintiff and Moad was made the sum of $44.86 per head, which was to be the amount of plaintiff's interest in the proceeds in each when sold, was arrived at by taking $42 as their
36 value per head when the contract was entered into and computing interest thereon at the rate of 12 per cent. per annum to the 1st of June, when the cattle were to be sold.

It further appears that for two or three years before the contract in question was made Moad had been to some extent engaged in dealing in cattle; that he had begun with a few thousand dollars capital, and, while at first successful, his transactions for a year or more before the time this contract was made with plaintiff had been so unprofitable that his original capital and profits had been substantially lost, and for about a year he had been in debt to Mr. Cox, or to the bank of which Mr. Cox was president, to an amount between $4,000 and $5,000, which he had from time to time secured by chattel mortgages on steers, horses, mules, etc., which he had or claimed to have in Ray, Caldwell, and other counties in Missouri; that notwithstanding he had so mortgaged such live stock Moad had, without the knowledge or consent of Cox, sold the steers, which were the most valuable and available portions of the property covered by such mortgages, and applied the proceeds to his own use, and about the 27th of February, 1885, Moad made a new chattel mortgage upon the cattle now in question and other farm stock to the bank to secure his note of $66.60, dated February 27th, 1885, and another note for $3,633.50, dated October 31, 1884 (which last-mentioned note had been secured by a former chattel mortgage on the steers which Moad had sold). No money was paid by Cox or the bank to Moad at the time this chattel mortgage of February 27, 1885, was taken, but it was either at that time or afterwards verbally agreed between Moad and
37 Cox that when the cattle were ready for market Moad should ship them to market in Cox's name, and that when sold the proceeds were to be applied on the indebtedness due from Moad to the bank.

It also appears, I think quite satisfactorily, from the testimony of Mr. Cox that he knew of Moad's financial embarrassment, and I am also satisfied, from the testimony of Moad and Cox, that Moad understood or knew he had made himself liable to a heavy penalty by selling the steers after he had mortgaged

them to the bank, and that his only hope of escaping punishment was by in some way satisfying the debt due from him to the bank—that is, while there is no direct proof in the case that either Cox or any one in behalf of the bank made any direct threats of prosecuting Moad for selling the steers he had mortgaged to the bank, yet it is quite clear from the proof that Moad acted upon the assumption that he was in peril of such prosecution unless his indebtedness to the bank was paid.

It further appears that the cattle in question were kept for a couple of months after they came into Moad's possession upon his father's farm in Caldwell county, Mo., and were then moved to a farm in Moad's possession in Ray Co., where they were at the time the chattel mortgage of February 27 was given, and where they remained until they were driven to the railroad station for shipment.

It is clear from the proof that neither Cox nor the bank ever advanced any money to Moad after he came in possession of the cattle in question, and that the transaction between Cox, the bank, and Moad was in effect an agreement to turn over these cattle,
38 or the proceeds of them, to the bank, or to Cox for the bank, in payment of an antecedent debt due from Moad to the bank.

It is claimed by defendant that the contract between plaintiff and Moad, when considered in the light of the accompanying facts, must be treated as a sale of the cattle to Moad for $44.86 per head, to be paid when the cattle were sold; that Moad was, in effect, the purchaser of the cattle, to be paid for at the price named by the first of June, or when the cattle were sold and the proceeds realized.

Upon its face the contract purports to be a feeding or agistment contract. The cattle were to be marketed by the plaintiff; Moad was to receive for his compensation for the care and feeding of the cattle all the net money realized by plaintiff from the sale of the cattle over $44.86 per head, and I see nothing in the conduct of the parties, either before or after the contract was made, inconsistent with the plain meaning of the contract. It is true that the proof shows that Moad wanted to buy the cattle and plaintiff put a cash price upon them of $42 per head. Moad then stated that he had no money to buy cattle with, but had plenty of corn and fodder to feed them, and proposed to buy them on credit. But plaintiff declined to sell them on credit, but proposed to give him a feeding contract, in which plaintiff should retain title to the cattle and give Moad what the cattle should sell for over $44.86 per head, after feeding them to the first of June, and these terms were agreed upon and embodied in the contract, the right of the plaintiff to market the cattle being fully provided for. It is urged, however, that when the eight head of cattle that escaped between Kansas City and
39 Moad's farm were recovered and brought back to Kansas City they were, by plaintiff's direction, sold for account of Moad; but the contract provided that Moad should be liable for all cattle that should escape at the fixed price of $44.86 per head, and when these cattle were recovered and brought back to Kansas City by a man in Moad's employ they were properly sold for account of

Moad. If they had brought more than the stipulated price per head the surplus would have belonged to Moad. They did not bring any surplus, but there was a balance left due, and Moad paid this balance to the brokers who sold the cattle, thus fully ratifying the sale and application of the proceeds.

It also appears that the plaintiff, during the winter, had occasion to borrow some money from a mortgage and investment company doing business in Kansas City, and placed this contract with Moad as collateral security, and that a clerk of the investment company sent a notice to Moad in May stating that his note would be due June 1st; but the proof shows there was no note given by Moad with this contract, and the contract does not call for any specific sum of money to be paid by Moad, and, although this notice bears the name of J. A. Forbes, the manager of the plaintiff company, yet it is a printed form with a printed signature, and was undoubtedly filled up and sent by some clerk of the investment company who knew nothing of the transaction and certainly had no right to construe or give a meaning to the contract.

It also appears that in March Mr. Forbes, the manager of the plaintiff company, wrote a letter to one of his employes, who was then at Moad's place, in which he states that he is sorry to
40 learn that Moad fears he will not make money on the cattle, and suggests whether Moad had not better pick out the best and sell them earlier than was first intended, and thereby reduce the expense of feeding and save interest. This reference to saving interest defendant claims is only consistent with the assumption that Moad was a purchaser of the cattle from plaintiff and was to pay interest on the purchase price. Mr. Forbes, in his testimony, explains the matter by saying that their cash price for the cattle at the time the contract was made was $42 per head. Moad was to feed them till June first, and have what the cattle brought over $44.86, which sum was arrived at by computing interest on the $42 per head at the rate of 12 per cent. per annum to June first, and if, at his suggestion, any of the cattle were sold before that time, this rate of interest should only be computed to the time when the sale was made and proceeds realized.

The transaction, then, seems to me to be clearly this, and nothing more nor less: Plaintiff had the cattle for sale on the Kansas City market at $42 per head cash. Moad wanted to buy them on credit at that price. Plaintiff refused to sell them to him on credit, but on this statement that he wanted to buy cattle to feed, because he had a large supply of feeding material on hand, proposed to let him have the cattle to feed upon a feeding contract in which plaintiff should have the right to market them, and out of this proposal grew the written contract now in question.

I have no doubt that the true intent of the parties is expressed by its terms; that it was intended to be as it purports to be, a feeding contract, in which Moad became a mere bailee of the steers
41 in question for the purpose of feeding or caring for them, and that his compensation for the feeding and care was to be what the steers should sell for over the stipulated price per head—

that is, Moad was to have the profit of feeding the cattle above 12 per cent. Moad did not understand from the contract itself, nor from the negotiations that led up to the contract, nor from what took place afterwards, that he was the purchaser of the cattle and had the right to dispose of or sell them.

It is, however, urged that, under the laws of Missouri, when the contract was made and executed, the legal effect of the contract was to clothe Moad with the apparent ownership, so that as between him and those with whom he dealt in regard to the cattle he is to be deemed the lawful owner, as the contract showing his special or conditional title was not properly recorded. Section 2507, Rev. Code of Mo., seems to be the only express provision of the law of that State upon this subject. It directs that "In all cases where any personal property shall be sold to any person, to be paid for, in whole or in part, in installments, or shall be leased, rented, hired, or delivered to another on condition that the same shall belong to the person purchasing, leasing, renting, hiring, or receiving the same whenever the amount paid shall be a certain sum, or the value of such property, the title to the same to remain in the vendor, lessor, renter, hirer, or deliverer of the same, until such sum, or the value of such property, or any part thereof, shall have been paid, such condition in regard to the title so remaining until such payment, shall be void as to all subsequent purchasers in good faith, and creditors, unless such conditions shall be evidenced by writing, executed, acknowledged, and recorded as provided in case of mortgages of personal property." I do not find that this statute, as far as it is
42 applicable to the facts of this case, has ever been construed by the supreme court of Missouri.

The claim on the part of defendant is that Cox is a *bona fide* purchaser of the cattle, because Moad was in possession and there was no contract or instrument of record showing that his title was conditional, but the supreme court of Missouri, in Anbichon *vs.* Bender, 44 Mo., 560, in construing the laws of that State in regard to the records of deeds and contracts pertaining to deeds of real estate, held that a purchaser who had parted with nothing, but had merely taken a conveyance of real estate in payment of an old debt, was not a *bona fide* purchaser.

"At common law there was no obligation to put upon record a conveyance affecting the title of land, but the duty of registration is now imposed upon the grantee, or the person to whom, or for whose use, the conveyance or covenant is made; and, as in all other cases where a duty is imposed, he who neglects it should suffer the consequences. The object of the requirement is to compel an exhibit of title to facilitate transfers, but principally to guard purchasers against imposition, and hence if the prior deed is not recorded a subsequent buyer, for good consideration, without notice, will be protected. This protection, always thrown around an innocent purchaser, and to which our statute also expressly entitles him, is founded on the broadest equity. He receives it, not because the prior deed is invalid in itself—the duty of recording it is not enforced by any such penalty—but because justice will not suffer a

person who omits a plain duty to set up a claim against one who has been led by that omission to invest his money in what
43 he supposed his vendor had a right to sell. But, to entitle him to such protection, he must have parted with something of value; otherwise he is not injured, and such is the spirit, if not the letter of the statute, and such has been its uniform interpretation."

In the light of this decision, and of many more of the same purport by the Federal and other State courts, I am of opinion that the provisions of section 2507, which protect *bona fide* purchasers and creditors who deal with an apparent owner in possession of personal property, only applies to and protects a purchaser who pays a present consideration or a creditor who trusts or gives credit to such person while in possession. Neither Mr. Cox nor the bank paid any present consideration nor give Moad any credit upon the faith of his being the owner of these cattle.

On the contrary, there is much in the record to justify the conclusion that Mr. Cox knew that Moad was not the owner of these cattle. The fact that, after he had obtained from Moad the chattel mortgage of February 27 on these cattle, he did not put this mortgage upon record is to my mind a very suggestive circumstance in support of the view that he relied wholly upon the advantage or hold he had upon Moad by reason of Moad's having sold the steers covered by his former mortgages, and the dealings between Cox and Moad in regard to these cattle satisfy me that Moad was governed by his fears of a prosecution rather than by any sense of obligation.

I think, too, there can be no doubt that Plumb, to whom Moad delivered the cattle as agent of Cox, knew that Moad was fraudulently and surreptitiously removing the cattle. It is true he
44 did not say it in so many words, but there was that in his manner of testifying which would justify a jury in inferring much more from what he did not say than from what he said. He was on the watch for the cattle when Moad drove them into Breckinridge, bought 56 head of them without weighing, and in such haste as to be of itself a badge of fraud, and his testimony as to his unscrupulous practices in starving the cattle for water, and then allowing them to drink heavily just before they were to be weighed, stamps the character of the man. There can be no doubt of Moad's fraudulent knowledge and fraudulent participation in the transaction. He kept the cattle 19 days beyond the term of his contract, pretending that he preferred to so keep them rather than to sell at the then current price, and in the meantime resorted to expedients to get Tunnyhill, the plaintiff's employee, who was at the farm, to leave there, and finally, when he did leave, on the 18th for a two days' absence at Kansas City, he made hot haste to get the cattle shipped before Tunnyhill's return. He knew he had no right to sell them, and the inference is conclusive from the circumstance that he dare not move them while Tunnyhill was at the farm; and yet Moad was made the agent of Mr. Cox and the bank to ship the cattle for them. Acting through agents like Moad and Plumb, and having

paid no present consideration, nor parted with a dollar, or a dollar's worth of value for these cattle, Mr. Cox cannot be deemed a *bona fide* purchaser or creditor for value. I do not think the case comes within or is affected by the laws of Missouri in relation to recording chattel mortgages or conditional titles to personal property,
45 as those statutes were only intended to protect those who deal in good faith with a person in possession of such property as the apparent owner.

The issue is found for the plaintiff.

Endorsed: Filed May 24, 1886. Wm. H. Bradley, clerk.

46 On the same day, to wit, on the twenty-fourth day of May, in the adjourned May term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Judgment.

THE WESTERN LAND AND CATTLE COMPANY, Limited,

vs.

JAMES W. PLUMB, JAMES W. MOAD, JAMES D. COX, THE UNION STOCK-YARDS AND TRANSIT COMPANY, and JESSE SHERWOOD.

Replevin.

Now come the parties, by their attorneys, and the court having considered, and being now fully advised upon the matters heretofore submitted herein, finds the issues for the plaintiff, and finds the property replevied herein, to wit, one hundred and thirty-five head of Colorado-Texas steers, branded 101, and the other brands, in the plaintiff and assesses the plaintiff's damages at one cent.

It is thereupon considered and adjudged by the court that said plaintiff have and retain possession of said one hundred and thirty-five head of Colorado-Texas steers, branded "101," and other brands, and that said plaintiff have and recover of said
47 defendants the said sum of one cent, its damages, together with its costs in this behalf expended, amounting to — dollars and — cents, and that execution issue therefor.

On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record; which said exceptions are in the words and figures following, to wit:

48 *Bill of Exceptions.*

Circuit Court of the United States for the Northern District of Illinois, of the March Term, 1886.

WESTERN LAND AND CATTLE COMPANY *vs.* PLUMB *et al.*

Be it remembered that on the trial of the above-entitled cause before the Hon. Henry W. Blodgett, judge of said court, on the 29th and 30th days of April, 1886, the same being days of the March

term, 1886, of said court, the issues of fact having been submitted to be tried by the court, without the intervention of a jury, the plaintiff, to maintain the issues on its behalf, introduced the following evidence:

JAMES A. FORBES' direct examination:

I reside in Kansas city, and I have been the general manager of the plaintiff since July, 1882. The complainant is a corporation organized under the laws of Great Britain. I was one of the incorporators; I have seen the original articles of incorporation.

Q. I show you what purports to be a copy of the same, with certificates thereto, and ask you to examine that and state whether or not that is a correct copy of the original article of incorporation with the certificate of organization on it?

A. Yes, it is, sir.

The copy of articles of incorporation identified by the witness was offered in evidence; to which defendant objected that it was incompetent, purporting to be the charter of a foreign corporation and not certified in such a manner that the court could take cognizance of it; which objection was overruled by the court, and exception to such ruling was then and there duly taken by defendant; which said document is in the words and figures following:

(It is agreed that only the title and certificates be copied herein, as they show the point of law raised.)

_____ _____,
_____ _____,
Plaintiff's Attorneys.
_____ _____,
Defendants' Attorney.

49 I, Samuel Hayman, of Somerset House, Strand, London, clerk in Her Majesty's civil service, make oath and say that I am a clerk in the joint-stock companies' registration office; that Earnest Cleave, Esquire, is the assistant registrar of joint-stock companies, and is duly authorized to sign certificates of incorporation of joint-stock companies and office copies of documents filed by them; that I was present on the twenty-third day of June, one thousand eight hundred and eighty-five, and saw the said Earnest Cleave sign the paper writings or documents hereunto annexed and marked with the letters "A," "B," "C," "D," and "E," respectively, being, respectively, a true copy of the memorandum of association of the Western Land and Cattle Company, Limited, a true copy of the articles of association of the said company, a true copy of extraordinary resolutions of the said company, a true copy of special resolutions of the said company, and a certificate of the incorporation of the said company, as in the said certificate mentioned, and that the name or signature "Earnest Cleave" to the said documents set or subscribed is in the proper handwriting of the said Earnest Cleave.

SAMUEL HAYMAN.

[2 shilling- 6 p. stamps.]

Sworn at No. 11 Abchurch Lane, in the city of London, the 23rd day of June, one thousand eight hundred and eighty-five, before me—
[Seal United States Consulate General, London.]

THOMAS M. WALLER,
Consul General.

"A." This is the document marked "A," or true copy of the memorandum of association of the Western Land and Cattle Company, Limited, referred to in the annexed affidavit of Samuel Hayman, made this 23rd day of June, one thousand eight hundred and eighty-five, before me—

THOMAS M. WALLER,
Consul General.

The companies acts, 1862 to 1885. Company limited by shares.

Memorandum of Association of the Western Land and Cattle Company, Limited. Registered 20th June, 1882.

(Per stipulation, the memorandum is omitted.)

A true copy.
[Companies' Registration Office Seal, 23 June, 1885.]

EARNEST CLEAVE,
Ass't Register of Joint-Stock Companies.

"B." This is the document marked "B," or true copy of the
50 articles of association of the Western Land and Cattle Company, Limited, referred to in the annexed affidavit of Samuel Hayman, made this 23rd day of June, one thousand eight hundred and eighty-five, before me—

THOMAS M. WALLER,
Consul General.

Articles of Association of the Western Land and Cattle Company, Limited. Registered 20th June, 1882.

(Per stipulation, the articles are omitted.)
A true copy.
[Companies' Registration Office Seal, 23 June, 1885.]

EARNEST CLEAVE,
Ass't Registrar of Joint-Stock Companies.

No. 16964 C. N. L. 16408.

Certificate of Incorporation of the Western Land and Cattle Company, Limited.

I hereby certify that the Western Land and Cattle Company (Limited) is this day incorporated under the companies acts, 1862 to 1880, and that this company is limited.

Given under my hand, at London, this twentieth day of June, one thousand eight hundred and eighty-two.

W. H. COUSINS,
Registrar of Joint-Stock Companies.

(Fee, $31 15*s.*)

This is the document marked "C," or true copy of extraordinary resolutions of the Western Land and Cattle Company, Limited, referred to in the annexed affidavit of Samuel Hayman, made this 23rd day of June, one thousand eight hundred and eighty-five, before me—

THOMAS M. WALLER,
Consul General.

Extraordinary Resolutions, Pursuant to Companies Acts and of the Western Land and Cattle Company, Limited, etc.

(Per stipulation, the resolutions are omitted.)
A true copy.
[Companies' Registration Office Seal, 23 June, 1885.]

EARNEST CLEAVE,
Assistant Registrar of Joint-Stock Companies.

This is the document marked "D," or true copy of special resolutions of the Western Land and Cattle Company, Limited, referred to in the annexed affidavit of Samuel Hayman, made this 23rd day of June, one thousand eight hundred and eighty-five, before me—

THOMAS M. WALLER,
Consul General.

51 *Special Resolutions (Pursuant to Companies Act, 1862, S. 51, Company Limited by Shares) of the Western Land and Cattle Company, Limited. Passed 30th January, 1885; Confirmed 20th February, 1885.*

(Per stipulation, the resolutions are omitted.)
A true copy.
[Companies' Registration Office Seal, 23 June, 1885.)

EARNEST CLEAVE,
Assistant Registrar of Joint-Stock Companies.

"E." This is the document marked "E," or certificate of incorporation of the Western Land and Cattle Company, Limited, referred to in the annexed affidavit of Samuel Hayman, made this 23d day of June, one thousand eight hundred and eighty-five, before me—

[Companies' Registration Five-Shilling Stamp.]

THOMAS M. WALLER,
Consul General.

Certificate of the Incorporation of a Company.

I hereby certify that the Western Land and Cattle Company, Limited, was incorporated under the companies acts, 1862 to 1880, as a limited company on the twentieth day of June, one thousand eight hundred and eighty-two.

Given under my hand, at London, this twenty-third day of June, one thousand eight hundred and eighty-five.

[Companies' Registration Office Seal, 23 June, 1885.]

EARNEST CLEAVE,
Assistant Registrar of Joint-Stock Companies.

Companies act 1862, sec. 174.

Q. Look at this other document and state whether it is also a true copy of the original articles of incorporation of the plaintiff.
A. Yes, sir; it is the same.

Hereupon plaintiff's counsel offered in evidence a like purported copy of the letters corporate of the plaintiff, being a printed duplicate of the preceding, with certificates appended as follows, viz:

"I certify that the foregoing are true copies of the memorandums and articles of association, and of the certificate of incorporation of the Western Land and Cattle Company, Limited.

52 "PAUL PHILLIPS,
"*Secretary of the Company.*"

"CONSULATE GENERAL OF THE
"UNITED STATES OF AMERICA, *London:*

"I, Lebbens H. Mitchell, vice and deputy consul general of the United States of America for Great Britain and Ireland at London, do hereby make known and certify to whom it may concern that the signature, 'Paul Phillips,' subscribed to the annexed certificate is of the true and proper handwriting of Paul Phillips, secretary of the Western Land and Cattle Company, Limited, and that to all acts by him so signed full faith and credit are and ought to be given.

In testimony whereof I have hereunto set my hand and affixed the seal of the consulate general of the United States at London aforesaid this 1st day of May, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal United States Consulate General, London.]

"L. H. MITCHELL,
"*Vice and Deputy Consul General.*"

The COURT: I think a sworn copy of it is competent to show that the corporation is actually in existence and doing business.

To which defendant objected as incompetent; which objection was overruled by the court; to which ruling of the court exception was then and there taken.

(Said duplicate letters corporate are omitted by agreement, the certificates already copied showing the point raised.)

FORBES' examination continued:

I have charge of all of plaintiff's business in this country. Its office is located at Kansas City, and that is the only office of the corporation in this United States. The company owns ranches of cattle

in New Mexico — Kansas, and owns land in these States, and does a general business of a cattle raiser and dealer in cattle and other live-stock farming, and owns a large number of cattle. I know James W. Moad; have had business dealings with him as the agent of the plaintiff. I first met Moad in the early part of November, 1884. I had some of the company's cattle on a pasture a few miles out of Kansas City, and the salesman at the stock-yards, who has charge of these cattle, informed me that Moad wished to get some cattle to feed; that he could not buy cattle, but had a large quantity of feed on his farm, and wanted to make some arrangement for feeding the cattle. This stock-yards man was James Stevens, of the firm of Gregory and Stevens. They handled most of our cattle that came into Kansas City. It was arranged that Stevens should take Moad out to look at these cattle and explain to him the terms upon which we would let him have them. It was arranged Moad should go home that night, and should call in a few days and sign an agreement and then take charge of the cattle. This first meeting occurred the first day of November, 1884. Moad returned a
53 week afterwards and signed an agreement, which was discussed and slightly altered to suit me, and then he and Stevens went together to arrange as to the delivery of the cattle over to him.

Q. I show you a paper, dated November 8th, 1884, signed by James W. Moad and attested by James Stevens and A. W. Penny, with a certificate of the recorder of deeds of Caldwell county, Missouri, showing it to have been recorded in that county on the 7th day of January, 1885. I ask you to look at that paper and state whether or not it was the writing signed on the 8th day of November, as you have stated, by Moad.

A. Yes, sir; it is the same paper.

Counsel for plaintiff offer in evidence the paper above referred to, which paper is in words and figures as follows:

"This contract and agreement, made and entered into this eighth day of November, 1884, by and between J. W. Moad, of Black Oak, Caldwell county, Mo., and The Western Land and Cattle Company (Limited), a corporation organized and existing under the laws of Great Britain, witnesseth: That said Moad hereby agrees within four days of this date to receive of the property of said company a number not to exceed one hundred and fifty (150) Colorado steers, beef cattle, each and all of said steers being marked and branded with the brand '101,' or other brand of said company, from the said Land and Cattle Company, at Peter Adams' pasture, near Independence, where said cattle are now located and pasturing, for the following purposes and upon the following express conditions only, to wit:

"The said Moad is to transport said cattle from their present location to his farms in Caldwell and Ray counties at his, Moad's, own charges and expense, and said Moad is then to properly feed, fatten, and care for said cattle for the purpose of their being profitably marketed by said company, and to that end said Moad agrees that

said cattle shall not deteriorate in flesh or condition from their present state, and said Moad is to commence feeding said cattle — corn by November 15th, 1884, and keep it up while said cattle remain in his care; that said Moad shall be and is liable and agrees to pay for all losses of said cattle arising from death, disease, escape, theft, or any other cause whatsoever at the agreed valuation of forty-four $\frac{86}{100}$ (44.86) dollars per head; and it is further agreed by the parties hereto that the period of said pasturage and care of said cattle by said Moad shall extend to June first, 1885, and that during said period from time to time the said cattle may and shall be shipped for sale or sold where they may be then by said company, by J. A. Forbes, its manager.

Price	$42 00
Int. 12%, 204 days	2 86
	$44 86

And, in full consideration for the full and faithful performance of all the acts and promises to be done and performed by said Moad as aforesaid, the said Moad agrees to receive in full compensation all moneys that may be realized by said company from the sale of said cattle over and above the sum of forty-four $\frac{86}{100}$ (44.86) dollars per head, after deducting all costs and expenses incurred by said company in and about the sales or shipments of said cattle.

54

And the said Moad hereby, for himself, his heirs, and assigns, expressly waives any lien either as agister or of any other kind or character of lien against said cattle which may arise during the performance of this contract, either by law or otherwise; and said Moad further agrees to keep and maintain said cattle, while in his charge, free from all claims, charges, liens, or liability whatever, from whatever source arising, except from the acts of said company or said J. A. Forbes.

JAMES W. MOAD.

Attest:
JAMES STEPHENS.
A. W. PENNEY.

Certificate of Record.

STATE OF MISSOURI, }
County of Caldwell, } ss:

I, C. W. M. Love, recorder of said county, do hereby certify that the within instrument of writing was, at 11 o'clock and 40 minutes a. m., on the 7th day of Jan., 1885, duly filed for record in this office, and is recorded in the records of this office, in Kingston, book No. 22, at page 129–30.

In witness whereof I have hereunto set my hand and affixed my official seal, at Kingston, this 9th day of Jan'y, 1885.

[SEAL.] C. W. M. LOVE, *Recorder.*

The interest of the Western Land and Cattle Company in the within contract is hereby assigned, for value received, to the Western Mortgage & Investment Company this 20th day of December, 1884.

J. A. FORBES,
Managing Director Western Land & Cattle Co.

Cancelled: J. A. Forbes, gen'l manager West'n Mortgage & Invest. Co. April, 1885.

(Endorsed:) Agreement with J. W. Moad, Black Oak, Caldwell Co., Mo., 8th day Nov., 1884.
150 cattle, $42 per head, 12% interest to first of June, '85.

55 To which testimony counsel for defendant objected *to the same* as incompetent, irrelevant, and immaterial; further, that the instrument was unilaterial, never having been executed by plaintiff; that the instrument had never been acknowledged or proved; that it had never been recorded in Caldwell county in any such place or manner as to impart notice; that it had never been recorded in Ray county at all, and that it showed an usurious transaction; which objection was overruled by the court; to which ruling of the court exception was then and there taken.

The erasures made on this document were made before it was signed—nothing erased since. So far as I remember, the contract was drawn in duplicate and I am almost positive a copy of it was given to Moad. I should think the copy given Moad was signed by the company, by myself as manager; I really don't remember the fact, but I should think that was the case. There was no other agreement between us; that was the entire contract between us; it was executed the date it bears. After the execution of that instrument I had a letter from Moad admitting he had received the cattle; told me they were on his farm in Caldwell county, near Black Oak, and not far from Ray county. Kingston is the county-seat of Caldwell county; Breckenridge is also in Caldwell county. It is from Moad's farm two or three miles. I sent up a herdsman in whom I had confidence to report the condition of the cattle. That herdsman was Robert Toneyhill. I sent him there first in the latter part of January, 1885; he remained at that time, perhaps, three or four days. He came back and made a report of what he saw; he was sent again to Moad's place—it must have been in March—and I should think he was there up to the time when the cattle left, maybe in June; he might have been away for a short time; he was back at Kansas City on or about the 10th to the 20th of April, and also up in Missouri in company with myself and some other gentleman. I mean to say he spent nearly all of his time at Moad's place during those months, from March until June. I saw him in Kansas City about the 19th or 20th of June. The 22nd day of June was the day on which those cattle were taken under the replevin writ. I saw him a day or two before that in Kansas City. I saw the cattle which were taken under the replevin writ in this case in the Chicago stock-yards on the day when they were taken under the replevin writ. I was there at the time the cattle were taken by

the marshal under the writ and turned over to me, and I signed a receipt, which is endorsed on the writ for the cattle. There were 135 head at the stock-yards, and I receipted for that number. I recognized the cattle as the same cattle that had been in the company's possession in Kansas City. They had the company's brand on them. They had come from the company's ranch, known as 101 ranch; 101 is the company's particular brand, registered and advertised in all the cattle papers around the country. Moad called at my office in Kansas City about the 16th of July, 1885, and admitted those cattle which were shipped into Chicago were the same cattle which he had received from me under this contract; Stevens was present. While in Chicago here, I met 56 James W. Plumb, one of the defendants, at the office of my attorneys, McCoy, Pope & McCoy. I ascertained from Plumb that 56 of the cattle were shipped in his own name, and the others were shipped in his own name for the use of James D. Cox. I understood he received the cattle from Moad. I did not receive from Moad any moneys on account of those cattle or this contract. I never gave to Moad any authority as to the pasturage of these cattle other than was stated in the written contract.

Cross-examination:

There were eight cattle returned to Kansas City, and those we took charge of and released or disposed of them. We gave Moad credit for them. We do not claim anything of Moad for those eight cattle. They are not in this suit. This suit is only as to the 135 head I found here in Chicago. Those eight cattle were a part of the 150 head delivered to Moad. I did not account to Moad for the eight cattle. I considered them as struck out of the contract with Moad. This eight head of cattle produced less than $44.86 per head. We have not settled the account with Moad. My intention was to waive that difference.

The COURT: What you mean is that eight head of the cattle in some way got away from Moad on the trip from Kansas City to his farm and back to Kansas City?

A. They were brought back by a man who was assisting Moad to drive the cattle.

Q. Instead of sending them on to Moad, he sent them back to you, and you simply sold them and gave him credit for the proceeds?

A. Yes, sir; Moad telegraphed to the agent of his in the yards to do the best he could with those cattle, and the agent spoke to my salesman, and I happened to be at the yards myself that day, and I said we would take them back and dispose of them and settle with Moad. All I know is they broke away from Moad, and I know this, that Moad expressed himself as satisfied at my having taken back those cattle, and what I did was with the view of making as satisfactory arrangement with Moad as possible. I looked upon it as a misfortune for him. This contract was the only paper that was executed with reference to this transaction. Moad gave me no note.

Q. I see on this paper an assignment to another corporation, an investment company, signed by you as manager and director of the Western Land and Cattle Company. Was there any other paper than this accompanying this assignment?

A. No; no other paper. Gregory and Stevens sold our cattle and handled our cattle for us.

Q. Here is a statement, a sales-bill, dated November 21st, 1884, purporting to be an account-current between Gregory, Stevens and Company and J. W. Moad, showing the sale of eight head of cattle, weighing 7,480 pounds; price, $4.00; aggregate, $299.20, with charges amounting to $16.00 for expenses of the sale, freight, yard-
57 age, $1.60; hay, $3.70. Then a note here that charges were paid by J. W. Moad, April 8th, 1885. Do you know about that? Look at the statement and see if you know about that.

A. I know it is a reference to this same eight cattle. Messrs. Stevens and Company incurred some expenses which they had a right to charge to Mr. Moad.

Q. I will show you a letter, dated Kansas City, November 21, 1884, and signed by J. A. Forbes, managing director of the Western Land and Cattle Company, and I will ask you if that letter was written by you?

A. Yes, sir; that is a letter containing just what I have mentioned now about these cattle—same facts, I think; that was written by me at the time.

Q. I will show you a statement in these words: "Western Mortgage and Investment Company, Limited. Kansas City, Missouri, May, 1875. Mr. J. W. Moad, Black Oak, Missouri: Your note to this company is due and payable at this office June, 1885. Amount of note, $5,964; interest, $413.50; total, $6,377.50." Look at that and see if you sent that notice.

A. I didn't send it.

Q. It was sent from your office.

A. Yes, sir; from one of our offices; not from the cattle company. It is a printed form; I didn't sign it.

Mr. McCoy: And the signature is printed also?

A. Yes, sir.

Mr. Childs: Sent in the form you sent notices of your maturing bills receivable.

A. A form we use for the mortgage company which I am connected with.

Q. Sent out notices of bills receivable?

A. Maturing bills—that is, either loans or different debts or other papers falling due.

Q. What note was referred to in that notice?

A. I don't know; there was no note.

Q. Did you ever have any other transaction than this with Moad?

A. No; I never had.

Q. Did your company?

A. No, sir.

Q. Did this Western Mortgage Investment Company, Limited?

A. Any transaction with Moad?

Q. Yes.

A. No transaction with Moad.

Q. Did that company ever hold any other papers than the papers received from Mr. Moad as evidence of this transaction?

A. No, sir. You see the contract was assigned to the mortgage company, and of course that notice refers to the contract. It is a misnomer to speak of it as a note. In the office of the mortgage company it was the duty of one of the clerks to send out those notices. I was managing director of that office also. This paper (referring to the contract) is what I relied on as our agreement. There are some seven lines erased out of this paper, because those lines referred to a herdsman being placed with the cattle, and Moad objected to the expense of having a herdsman to attend them. He said he could do it himself, and, in consideration of his wish, it was struck out. I refer to these lines: "May employ a competent herdsman, to be selected by J. A. Forbes, whose sole duty shall be to attend to the said cattle, and said herdsman's pay shall be $30.00 per month, and furnish board and lodging suitable for said herdsman."

Counsel for defendant reads letter, dated March 31, 1885, as follows:

58 The Western Land & Cattle Company, Limited, S. W. cor. Seventh and Delaware —. J. A. Forbes, managing director.

KANSAS CITY, Mo., *M'ch* 31, 1885.

Rob't Toneyhill, Esq., care J. W. Moad, Esq., Black Oak, Caldwell Co., Mo.

DEAR SIR: Yours of the 27th inst. is at hand. I am sorry to learn that Mr. Moad thinks he will not make money on the cattle. Ask him if he does not think it best to sell some of them earlier than was at first intended, say, pick out the fattest, and thus reduce expense of feeding and stop interest. Tell him to write me what he thinks of shipping in a car-load or two, or as many as are in favorable condition for market.

I may want you here about the 10th of this month, but will let you know certainly in time for you to get here.

Yours truly, J. A. FORBES,
General Manager Western Land and Cattle Co.

Mr. Toneyhill was the man I sent to look up these cattle. I paid his expenses. We fixed the price at $44.86 per head. The $2.86 a head was the interest from the first of November up to June.

Q. I notice written across the assignment of this contract these words, Mr. Forbes: "Cancelled. J. A. Forbes, general manager of Western Mortgage Investment Company. April 18, 1885." Then that is the time when you cancelled this assignment, was it?

A. It seems so.

Q. That is the time?

A. I cannot say as to that.

Q. Do you know whether this April 18, 1885, was put on there at the same time when it was cancelled?

A. I cannot say, really. I can explain, if you wish me to explain, how it was. I could not say, really, whether it is the date on which it was cancelled or not. I cannot say from memory.

Q. Well, refer back to this notice which the Mortgage Investment Company sent out, dated in May? Was it put on at that time or some other time?

A. No, the Mortgage Company sent out notices in May; the Mortgage Company cancelled this in April.

Toneyhill left Black Oak Wednesday and came up to Kansas City on some business, and left of his own accord. He did not let me know he was coming, but ran up to Kansas City for a day on some private business of his own; was absent, I suppose, until Friday. On his return on Friday he found the cattle had been removed from Moad's farm, and he immediately made his way back to Kansas City and informed me of it on Sunday. I immediately started for Chicago to try and stop — to get possession of the cattle, and succeeded in doing so the next Monday. I came immediately up here and replevied the stock. The letter which I have identified as written by me November 21, 1884, reads as follows:

The Western Land & Cattle Co., Limited, 12 Delaware block, cor. Seventh and Delaware —.

KANSAS CITY, Mo., 21*st Nov.*, 1884.

Mr. J. W. Moad, Black Oak, Caldwell Co., Mo.

DEAR SIR: Your telegram of this date from Breckenridge, addressed to Mess. Penney & Co., was brought into Messrs. Gregory and Stevens' office to-day while I was there closing up a sale of cattle on an arrangement somewhat similar to yours, and Mr.
59 Stevens persuaded the buyer to take your eight steers on the same terms as he had bought a lot of 110 cattle from the company, namely, 4 cents per pound. I am assured that this is considerably over the price that your cattle would have fetched if sold in the yards for cash, and thought this company would have much preferred a sale for cash; still, in order to save you from loss as far as possible, I agreed to the arrangement. The steers only weighed lbs. 7,480, or, on an average, lbs. 935, and will therefore, I regret, leave you some loss, even at 4 cents per pound. There are also the charges to be paid, which, I believe, are as follows:

Frank Shough's expenses	$24 50	
Less paid by you	10 15	
		$14 25
Freight		10 70
Yardage, 1.60, and hay, 3.70		5 30
		$30 25

I was very sorry to hear of your bad luck with the steers, and would be pleased to learn that what has been done meets your approval.

Yours very truly, J. A. FORBES,
Managing Director Western Land and Cattle Co.

The word sale in the letter is a misnomer. There was no sale. It was a contract just as you read.

Redirect examination:

When these cattle came to Kansas City in the first instance they came to Gregory and Stevens as commission merchants for the company, and they attended to sending them out to pasture for us at my request. I directed the recording of this contract; sent it to the recorder's office; I never had it recorded in Ray county. I was never there or saw the cattle there; I only know what Moad told me about his farm; that he was having these cattle in Caldwell county; he told me he had a farm in Ray county also. I do not know, as a matter of fact, where he kept them—whether in Ray county or Caldwell county. I was never there; I didn't see. I am the agent of the Western Mortgage Investment Company, which is a corporation which loans money in this country. Having borrowed some money from the mortgage company, I placed this contract, which represents 142 cattle, with the mortgage company as security. The loan was only a temporary one, and at the same date, whether it was just on the day of making this collection on it —, it was repaid, and I just wrote cancelled across this assignment. The assignment was cancelled when the loan was repaid to the mortgage company; the mortgage company had no interest in the contract after the payment of the loan; the only interest they had was as collateral security. I did not know Toneyhill was in Kansas City or absent at all from Moad's place, but I afterwards learned he had been in Kansas City one or two days before Sunday, the 21st of June. The man who brought them back (those eight cattle) was the man Shoff, the young man employed to assist Moad in driving these cattle from Independence to Moad's farm. He was selected by Mr. Stevens. In sending this instrument for record to the recorder's office I
60 gave no special directions as to the correct book in which it was to be recorded. I should have supposed it or would have classed it under chattel mortgages rather than anything else. When I borrowed money from the mortgage company no note was given. Both offices were under one management.

Stipulation with Plumb as to 56 head offered in evidence, and the same is as follows:

It was admitted, for the purposes of this trial, that of the 135 head of cattle taken on the writ of replevin in this case 56 head had been sold by Moad to one J. W. Plumb, and were shipped from Breckenridge Station in the name of Plumb, and 79 head were shipped in the name of Plumb for the use of J. D. Cox; that a settlement had been made between plaintiff and Plumb in regard to the 56 head which were claimed by Plumb, so that the controversy

remaining to be tried is in regard to the 79 head claimed by Cox. The cattle delivered by plaintiff by Moad under the contract are accounted for as follows:

Originally delivered to Moad	150 head
Lost out of drove on the way from Kansas City to Moad's place	8 "
Otherwise disposed of by Moad	7 "
Sold to Plumb by Moad	56 "
Sold to Cox and now in controversy	79 "
	150

And the defendant Cox, to sustain the issues on his part, introduced the following testimony:

J. D. Cox.

Direct examination:

I reside in Caldwell county, Missouri, at Kingston, the county-seat, and my business is that of a banker. I never met Forbes until yesterday. I have been well acquainted with Moad seven years. He has been doing business with me for the last four years. Moad was indebted to me about $5,000. I wanted to use my money in June. Moad said to me he had so many cattle on hand in his possession and wanted to make a sale of these cattle along in June. He first commenced to sell to me from the 27th of February to the 1st of March, but it was consummated in June by selling me seventy-odd steers, and they were delivered to me when they were shipped from Breckenridge. There was no time set for this delivery, when we first talked about it; he was to ship in my name and make returns to me. I say that Moad owed me $5,000. The debts commenced running in June, 1884. I loaned him at one time, October 31, 1884, $3,633.50, with interest at 10 per cent.; at another time, June 11th, 1884, $1,000, with interest at 10 per cent.; and at another time, February 27th, 1885, $366.60, with interest at 10 per cent. A chattel mortgage I had taken February 27th, 1885, — indebtedness, making $5,000. I first met Moad with reference to the getting of my pay on these loans
61 February 27th, 1885. I then told Moad to make me secure for my money—to sell me those steers—and he commenced on the sale at that time. He said he held in his possession or he was the owner of about 140 head of steers, as I have it in my mind, and he turned them — to secure me for my money—70-odd head of steers—enough to pay that debt. I had another conversation in this regard, I believe, some time in March, 1885, when he stated to me the cattle were doing well, and he was satisfied they would pay my debt. Nothing further passed between us until the shipment. When they were ready for shipping they were to be shipped in my name for my use. To pay the debt I was to have the cattle; that was the understanding—the cattle were to be mine. When they were delivered to me they were, as a matter of fact, to be shipped in

my name. There was some other stock—a few horses—that was secured by another chattel mortgage, and if there was any deficiency it would be made out of it, and a settlement made of all the transactions that had taken place. When the cattle were brought into Breckenridge, Moad dispatched to me that the cattle were there. I answered, "Ship them in my name." I was 20 miles from the place. I first learned those cattle had been replevied immediately afterwards. This 60 head of steers named in the chattel mortgage of October 31, 1884, is no part of this same cattle; it was to secure the *same* of $3,675. I never had the 60 head in my possession. I got from Moad three horses, seven cows, a couple of mules, and two spans of horses. I never had a mortgage on any portion of these cattle in controversy. I consider that as a purchase outright and the money received to go towards liquidating the debt. I had no knowledge of any such instrument as this contract that Mr. Forbes has offered in evidence here up to the time these cattle were replevied. It took me by surprise. I know nothing of any claims set up by any other man in that country.

Q. Did you search the records of Ray county?

A. I keep a lawyer in my bank who keeps track of such matters, and he never found this record. I caused an examination of the record of Ray county to be made by my attorney to find whether there was any mortgages or liens against this property. There was nothing in Ray county. Before I got my mortgage of October 31, 1884, on record in Ray county another gentleman stepped in before me and recorded his as to the 60 steers, and I did not get them. Those cattle I bought of Moad at the time were in Ray county. They had been there for some time—all the time I had known nothing about them. There was 139 or 140, altogether.

Cross-examination:

Mr. Moad first became indebted to me. Of this indebtedness he owes me at the present time, June 11, 1884, $1,000. I loaned to Moad, October 31, 1884, $3,633.90. That was paid to Moad in cash by me the 31st of October, 1884. I took from Moad at that time the chattel mortgage and the note. This note, dated October 31, 1884,
62 payable ninety days after date to the order of the Caldwell County Bank for $3,633.90, signed by James W. Moad, and this chattel mortgage, dated October 31, 1884, and covering the description of property which Mr. Childs read, recorded the 5th day of November, 1884. Those papers I received at that time from Moad in person. I swear to the fact and positively know. I am cashier of my bank, and I do my business thoroughly. I had been doing business with Moad since 1881. I have loaned him money at different times for the purpose of buying cattle. I do not know as I ever had one of those mortgages acknowledged or specified on the books from the time I commenced loaning money. When he sold the cattle and returned with the money I placed it to his credit, and gave him credit for the amount on the note. I have no doubt that all the chattel mortgages on record which have not been satisfied that Moad gave me or the bank are still on record there. This

mortgage which I hold in my hand here is a mortgage covering the one of April 30th, 1884, which you have shown me a copy of. By examining these two you will find them identical—that is, the mortgages of October 31 and April 30th. I made the loan on the 30th of April, instead of October 31st. It was wrong—October 31st. The first loan was April 30th, 1884, for $3,633.90. The chattel mortgage of April 30th was for sixty head of steers. I did not get my mortgage on record in Ray county soon enough to hold them. I think, only from hearsay, they were sold by Moad; I don't know it. It was no use to do anything about it. I made Moad a loan of $1,000 in June, 1884, and took security for it—a note dated June 11, 1884, payable ninety days after date. This was the chattel mortgage dated the 5th of November, 1884, and recorded the 5th of November, 1884, to secure this note of June 11, 1884. The chattel mortgage covers "thirty-five head of three-year-old steers, valued at $35 to $40 per head, the same to be in Ray county, on my farm, in section 6, range 84, township 26." What became of these cattle I don't know. I never got them; don't know what Moad did with them; made an effort to find out; they were never brought to Ray county. I took a chattel mortgage on the 31st of October. It was recorded November 5th, the same day as this one to secure the $1,000 note. Those sixty head of steers described in the chattel mortgage of December 31, 1884, were in the chattel mortgage of April 30th. Those sixty head of steers were sold to Davis. Those were not the steers that Moad obtained from the plaintiff in this case. The next chattel mortgage I took from Moad after the one recorded November 5th, 1884, is the chattel mortgage made by Moad February 27th, 1885, running to the bank, for a note of $3,633.90, dated February 27th, 1885, due ninety days after date, bearing ten per cent. interest from date, and a note of $366.60, dated October 1st, 1884, due ninety days after date, bearing ten per cent. interest from date. That is the next mortgage I had from Moad. It was not recorded; it secures a loan I made in February. There was due me at that time $5,000; $366.60, covered by a note in February, was interest on a former note, and a portion of it was for hogs got from B. T. Smith. At the time that the mortgage was made there was a conversation between myself and Moad about these 140 steers. In the course of that conversation Moad said nothing to me about where those
63 steers came from. He said nothing to me about the Breckenridge bank having a mortgage on them, only he made a statement. McLaughlin wrote that mortgage. I didn't ask him where he got those 140 steers; didn't ask him what became of the other steers that had been covered by previous mortgages at that time; I knew. I felt uneasy to find out those steers had been disposed of. I am positive he didn't say where he got those 140 steers; I didn't ask him. When this cattle was ready for sale they were to be shipped for my use to pay that debt; Moad said so to me at the time, and of course I was pleased to get the money. At the time I took the chattel mortgage on the cattle in controversy and made the arrangement with Moad that they should be shipped and sold for

my use I did not pay any money or part with any security. The indebtedness described in that mortgage was all old indebtedness. I will say to you I put $50,000 in cattle this last season, and just the conversation between those two gentlemen I do not know. I had only one other case where three different times a party had sold out the stock without paying me money. I presumed his financial condition was pretty good at this time. I have been doing business for four years, and, as general banker, I know something about the financial standing of a man I am lending money to. I have never made inquires of other parties as to Moad's financial standing. I knew what he was claimed to be worth. Up to this last May I knew his neighbors have loaned him a great deal of money. I have loaned him from $3,000 to $7,000, and he always returned it to me until these last loans. His integrity was unimpeached as a man in his neighborhood. I did not ask Moad about the 140 head. He told me he had 140 head of cattle on his farm in Ray county. I did not know from my own knowledge this man's financial condition at that time; that he hadn't money with which to buy 140 head of cattle; neither I nor any other banker there suspected that he hadn't. The Breckenridge Saving Bank generally accepted anything of that sort. I mean just exactly what I say, that these cattle were Moad's own; in his possession, in his own right—the property. They were on his farm. Moad made no change from the first agreement.

Q. Do you recollect any conversation?

A. Nothing at all, sir.

Q. Did you have any information from him at any time as to when he was going to ship the cattle?

A. No, sir; he did nothing for me. I made no inquiry as to whether or not any person was in possession of the cattle further than my knowledge of the record through my attorney. I did not examine the record myself. I asked my attorney to examine the records of Caldwell county. That is his business, as far as my attorney is concerned, when I make a loan to see that the property is clear. He reported that those cattle were replevied. I didn't record that chattel mortgage of February 27th, because it was in Ray county, where he lived, about 30 miles from where I resided, and I probably forgot it. I had got left once before through not recording a chattel mortgage from Moad. My first information from Moad as to when he would ship the cattle was a telegram. I will state,
64 as near as I can, the contents of that telegram: "I am now in Breckenridge. The cattle is ready for shipment. Shall I ship in your name?" My answer was, "Yes." I have neither telegrams nor answers here. Didn't know Plumb was to take the cattle to Chicago. I am slightly acquainted with B. F. Smith. I don't know whether he first brought me the note and chattel mortgage of October 31, 1884, or not; I don't remember.

The indebtedness of Moad to me at the time I stated in my direct examination was $5,000: all that Moad owed me up to that time is that amount. You will find it is $5,000 and a few cents. I was to hold these cattle for the entire indebtedness to liquidate my debt as far as they went; I did not know what they would bring, neither

did he. Did I advance him any money on that day, February 27th, 1885? It was equivalent; it was equivalent to an advance of money. I had paid B. F. Smith for the hogs some time before that; I believe it was about a year before; it was an old debt. On the 27th of February, at the time I took this new mortgage, I did not advance any money and I surrendered no security which I had prior to that time, for there was not anything to surrender. I knew before then that the cattle covered by the previous mortgages had been disposed of. I did, on the 27th of February, release Smith from $100.00 and take Moad in place of Smith, and the same hogs which secured me while Smith owed me were turned over to Moad and secured me under Moad's mortgage for this $100,00. I did not part with any money at that time—simply as much changed from Smith to Moad.

I remember stopping at Smith's house one morning and meeting him on that occasion and had a conversation with him concerning a debt.

Redirect examination:

These cattle were received by me on account of all this indebtedness, and, at the same time, if the stock did not liquidate the debt, as far as it went. So far as taking the stock for just that amount of money, it was not so.

JAMES W. PLUMB.

Direct examination:

I reside in Breckenridge, Missouri; business, shipping stock; met Forbes here some time in June; am acquainted with Moad and Cox; have been acquainted with Cox about 18 years. On the 19th day of June last I bought cattle of Moad—56 head; six weeks prior to that time I knew they were feeding. Yes, I did not see Moad at that time; I was in the feed lot. Those cattle at that time were in Ray county. I heard the cattle were coming into market to be shipped at Breckenridge, and I watched for them and looked them over and bought 56 head. These were selected out from the others in different pens in the lot, and I bought certain ones in certain pens in the yards at Breckenridge, and the others I did not make any bid on at
65 all. They said they belonged to Cox; they were sold to Cox.

The 56 head I purchased were loaded separately on the cars and kept separate in Quincy, and in the yards at Chicago. The account sales of the two lots were rendered separately. The railroad way-bill read from J. W. Plumb to Strayhorne & Co., for the use of John D. Cox. Thus billed they would draw from the company $5.00 a car. By my arrangement I was able to save $20.00 on the shipment. I bought the cattle and gave Moad my check *from* them at the Breckenridge Savings Bank, and drew on Stryhorne & Co. for $3,000. I started Friday, laid over one day at Quincy, and got here about 8 o'clock Monday morning, and the stock were delivered. The writ of replevin was served; they stopped the sale there about nine o'clock in the morning that I arrived, and the cattle were

sold the next day on the market, about 10 or 11 o'clock. At the time the cattle were sold, as compared with the condition of the market at the time the cattle were received by Strayhorne & Co., the market was five to ten cents lower—ten cents, I calculated.

Q. And what was the condition of the cattle with regard to marketing at the time they were marketed, as compared with their condition when they were unloaded out of the cars?

A. Well, when they were unloaded out of the cars, you know we take the cattle in there and feed them up ready to sell, and get them watered up—what we call a good full—and let them go; and so it gets in the weight on them—they are just right. Mr. Strayhorne's man, or his partner—I forget his name—just rode up to the fence to sell them—to sell off the cattle—and I sat on the fence with my boy watching them drinking. I think, in my judgment, the average difference in weight in those cattle between the time they were ready for sale on the market and the time they were actually sold was from 50 to 100 pounds less. Holding them over one day, I think, would make that difference per head.

Cross-examination:

I paid for those 56 head of cattle—my check was paid.

Q. Didn't you tell the company that that check was not paid; you never paid a dollar of it?

A. No, sir; I never told no living man so.

I have been shipping cattle and hogs about six years. Some years ago I handled Texas cattle, and I have handled Colorado cattle. If a man is shipping cattle from our part of the country he has got to be a judge of all kinds. We generally buy them by the pound. The 56 head and the 79 head were about the same. The cattle sold at $5.10 per hundred. I didn't know anything about the arrangement between Cox and Moad. Moad told me those were Cox's cattle, and to ship them in Cox's name and take care of them for him. I acted on the instructions given me by Mr. Moad. I didn't know about any instructions from Mr. Cox at all. The cattle had not been weighed on the way in, and I remained over about three days. The notice to me was, Mr. Strayhorne could not sell the cattle. If the cattle were held over until 7 o'clock in the evening by the stock-
66 yards company, it would be too late to sell them that day on the market, or if they had been held until two o'clock it would. I think they shrank between 50 and 100 pounds a head. The reason I base my judgment on that, I shipped four loads from Mooresville, and they were weighed; I sold them by the pound; they held them over Sunday and they shrank 100 pounds to the head. When cattle have been laid over they are called stale cattle. We would rather have cattle on the market the first day—we fellows in the country.

JAMES A. FORBES.

Direct examination:

The exact net proceeds of all the cattle was $7,761.40; the net proceeds of the 56 head was $3,235,25, and the net proceeds of the 79 head was $4,526.15. All did not bring the same price. The 56 head were sold at $5.00, and the other 79 head were sold at $5.10 per hundred.

The following sales-bills showing the amount for which the cattle claimed, 1st, by Cox were sold, and 2nd, the amount for which the cattle claimed by Plumb were sold.

(Copy.)

UNION STOCK-YARDS, CHICAGO, ILL., *June* 23, 1885.

Gregory, Cooley & Co., commission merchants.

Proceeds of sale:

No.	Weight.	Price.	Gross.	
78.	94,410	c. 5-10	4,814 91	
1.	910	c. 3-90	35 49	
				4,850 40

Charges:

Freight & feed on road	235	
Yardage	19 75	
Hay, 2,000 lbs.	30	
Commission	39 50	
		324 25
Net proceeds		$4,526 15

(Copy.)

UNION STOCK-YARDS, ILL., *June* 23, 1885.

Gregory, Cooley & Co., commission merchants.

Proceeds of sale:

No.	Weight.	Price.	Gross.
56.	69,550	c. 5.00	3,477 50

Charges:

	Freight & feed on road	177 75	
	Yardage	14	
67	Hay, 1,500 lbs.	22 50	
	Commission	28	
			242 25
	Net proceeds		$3,235 25

JAMES W. MOAD.

Direct examination:

November, 1884, I was living in Caldwell county, Mo., on my father's farm, and in the latter part of February I moved from there to my own farm, in Ray county, Mo. It was about two miles from the place that I lived on father's farm to the place that I moved on my own. I had a transaction with Forbes, as manager of the plaintiff, in November, 1884. My business was mostly transacted with Stevens. A. W. Penney, a commission merchant of Kansas City, Mo., was employed to assist me, and through him I was first brought into correspondence with the plaintiff. Penney sent me a telegram at Brenckenridge, Mo., that I could buy cattle on time; to come at once; and I did go there, and met Penney. We found Stevens, and I was introduced as a party that wanted to buy cattle on time, and we went to see the cattle. Stevens, Penney, Ollinger, and myself went. We talked together all of the time in going to the pasture and coming. I told him if he — a mind to take $42 a head for the cattle we would give it, and if he would not the cattle could go, and that we were to pay 12 per cent. on the money. He said he would take $42 a head, and the price was concluded there. There were present at the time Stevens, Penney, Olinger, and myself. Stevens said he was dealing for the Western Land and Cattle Company. He sold the cattle for that company; that Forbes was the managing director. We went to Forbes' office. Forbes asked me, says he, "Mr. Stevens says you are going to take or have contracted for a hundred and fifty head of those cattle." Says I, "Yes." Says he, "$42 is the price." Says I, "Yes, sir." Says he, "The interest is 12 per cent." Says I, "Yes." That was about the conversation. The interest was to be 12 per cent. until the debt was paid. I acted on that as the conclusion of the agreement. They then agreed to keep the cattle two weeks as a fever guarantee, and at the expiration of that time I went after the cattle and got them. I evidenced the debt for the cattle by giving them a note, and I gave them a contract as security; that was my understanding; that was what Forbes stated at the time. I did give a note, and that has never been returned to me. The note was given for the amount of 150 cattle at $42 a head, with twelve per cent. interest. Then I drove the cattle directly to Ray county, Mo., to my farm. I kept them in Ray county until about the fore part of April, 1885; then I moved them in Caldwell county. They were there about six weeks, and then I moved them back into Ray county, and had them in Ray county before I marketed them just exactly a month, but I first had the cattle from November up to some time in April in Ray county. With re-

68 gard to selling the cattle to Cox and letting him take them, the first conversation I had with him occurred along about the first of March; — that conversation at that time I told Cox that when I got ready to sell I would settle with him. I was owing Cox about $5,000; that indebtedness was evidenced by notes and chattel mortgages. Cox said he had been leaving the matters loose, and he wanted the cattle turned over to him at the

station to pay the indebtednesss, and I agreed to do that. I saw him once or twice at his bank after that. Our conversations at those times were all to the effect that this stock should go to the liquidation of the indebtedness as far as it would when it was marketed.

Q. Well, now, did you designate what portion of that stock this 135 head should go to him at these conversations?

A. I don't remember that I did or that I did not.

Q. It is true that a portion of them were mortgaged to the Breckenridge Savings Bank, isn't it?

A. Yes; but I don't know that the exact number was designated, but I think it was included in his—what he had a loan on. I don't know that we designated any particular number; that was a matter of understanding at the time.

The way I happened to give Cox just 79 head and Plumb 56 head, the 56 head were covered with liens to the savings bank. I turned over what were not covered by other mortgages to Cox. The understandnig was that he was to have what was not covered by mortgages to the bank. At the time I brought the cattle up to Breckenridge I sent a telegram to Cox that I would ship the cattle; that the cattle would be turned over to him that day; I notified him by telegraph. I told Plumb to take care of them for Cox; that they were Cox's cattle; to see to them, to keep them up, ship them through in good shape. I receive the letter dated November 21, 1884, on or about the day of its date, or soon after, which Forbes testified he had sent in regard to the sale.

(Copy of said letter is inserted above in cross-examination of Forbes.)

The charges on this sales bill, amounting to $16, were paid by me April 8th, 1885, at the office of Gregory and Stevens, in Kansas City; that was the charges and expenses on those eight steers. When I went to Kansas City I settled it, and they gave me a bill.

(Counsel for defendant offered in evidence a sales bill dated November 21st, 1884, as follows:)

KANSAS CITY, MO., *Nov. 21st*, 1884.

Gregory & Stevens, live-stock commission merchants, sold for account of J. W. Moad, ac. Western Land & Cattle Co.

Cattle.	Weight.	Price.	
8	7,480	4	299 20

Charges:

Freight	10 70
Yardage	1 60
Hay	3 70
	16 00

E. & O. E. Gregory & Stevens.
Charges paid by J. W. Moad Apr. 8th, 1885.

69 Also the notice, identified by Mr. Forbes, dated Kansas City, May, 1885, notifying Mr. Moad that his note for $5,964 will be due in June, 1885, including interest, amounting to $6,377.50, as follows:

WESTERN MORTGAGE AND INVESTMENT COMPANY,
KANSAS CITY, MO., *May*, 1885.

Mr. J. W. Moad, Black Oak, Mo.:

Your note to this company is due at this office June, 1885.

Amount of note	$5,964
Interest	413 50
Total	$6,377 50

Please give the same your prompt attention.

J. A. FORBES,
Gen'l Manager.

This first conversation with Cox was about the first of March. I had had the cattle up to that time, then had them, and for some time after had them in Ray county, and I finally drove them out of the pasture in Ray county into the market. I think Cox knew where those cattle were. I don't remember that I told him.

Cross-examination:

I sold the cattle to Cox. I did not tell him anything about owing Forbes anything; didn't tell him I had a contract with Forbes on these cattle; didn't tell him I had not paid for the cattle. I have owed Cox as much as $11,000 at one time. I am very sure I gave a note for these cattle. I signed the note in Forbes' office at the time of signing the other papers; that writing was the only contract in writing we had outside of the note. I have never seen that note since. Stevens told me they were selling cattle on time, either part down and part time, or all time, or one-third, or one-quarter, one-half, or nothing down. The first time I heard anything about a feeding interest was when Forbes swore to it at Kingston, when he had me arrested. I knew he had me arrested, because I saw his name in the paper charging me with stealing 150 head of his cattle; —was one charge and the other charge was embezzling. I haven't got that paper. The man that swore Forbes to that paper is in court; he is Governor Marmaduke's nephew, Harwood. Stevens told me a mortgage, and Forbes said he would take a contract to answer the place of a mortgage.

Q. Well, how did you come to be selling these cattle to Mr. Cox when you knew you had not paid Mr. Forbes for them?

A. I had a right to sell them; if I had bought the cattle I had a right to sell them if I wanted to.

Q. You regarded that as an honest, straight transaction, did you?

A. Well, yes; provided I paid Mr. Forbes and paid my other indebtedness, I did so regard it. Stevens said he was selling cattle for Forbes' company. I am sure he said "selling." I sold Plumb

the same cattle that were covered by a mortgage to the Breckenridge Savings Bank. They agreed to keep the cattle for a week or two as a fever guaranty.

Q. You were about five days on the drive, were you?

A. I don't remember how long we were on the drive; we were a good deal longer on the hunt than we were on the drive.

Q. You had a good deal of trouble in getting the cattle across the river?

A. Yes; a general stampede.

70 Q. The eight head you could not get across?

A. Yes; we only had one day's drive on the eight head; the cattle stampeded on the pasture and we couldn't find eight head the next day.

Q. The young man that helped you drive them was a young man Mr. Stevens sent from the stock-yards, wasn't he?

A. No, sir; he was a young man Mr. Stevens recommended to me as a good man and I employed him. Mr. Stevens said he could recommend this young man, and I employed him on his recommendation.

Q. He took eight cattle back?

A. Yes, sir.

Q. And this note you say was for 150 head at $42 a head?

A. With 12 per cent. interest, yes.

Q. Was the amount of interest included in the amount of the note?

A. Yes, sir.

Q. Do you recollect the amount of that note?

A. The amount of that note is for the whole amount at $42 a head. One hundred head would be $4,200; fifty would be half of that—$2,100, and that makes $6,300. I suppose that is the face of the note—of the whole thing.

Q. Is that the amount of the note?

A. That is my recollection. I gave it for the whole amount of the 150 head of cattle; that is what it amounts up to per head.

Q. Well, twelve per cent is not legal in Missouri?

A. No, sir. Well, it is mentioned on that contract, and it wouldn't be legal either place, I suppose, to put it down; it would be just as legal one place as another.

I had a man by the name of Tunneyhill up there at my house. He came there, I think, in March and was there, with the exception of one intermission, until the 17th or 18th of June. I think it was the next day after he left that I started the cattle, between 7 and 8 o'clock, and got them into Breckenridge not far from sundown; they were shipped out that night; they were loaded just in time to catch the train; the train comes along not later than ten o'clock. Tunneyhill was up there feeding cattle for me. I paid him $15 a month—paid him the money and boarded him too. He said Forbes sent him up there; didn't tell Tunneyhill that I did not want him to say anything to the neighbors about the Land and cattle company owning those cattle. I did not consider the cattle company owned the cattle. I may have told Tunneyhill I did not want him

to say anything about my indebtedness to the cattle company. I didn't know that Tunneyhill was sent up there by Forbes to see that the cattle were not driven off until Stevens told me that after I was arrested; at least, Tunneyhill told me he was getting wages of Forbes. He told me that Forbes was paying him about $35 a month. I was paying him $15, making about $50 a month he was getting. After Tunneyhill had been to my house I requested he should come back. I did not tell him I was going to drive those cattle out of there the time I did. I didn't expect to ship the cattle then—at that time Tunneyhill was there—until about the 10th of July; I had corn to feed them. I told Tunneyhill I didn't want him to say anything to the neighbors about my owing Forbes on these cattle, when he first came down. I have never paid Forbes anything on those cattle, only what he got out of those eight head. I have not paid Cox either. The property that was security in Cox's mortgages
71 was pretty much all gone before I made the — Feb. 27th to him, which covered those cattle. His previous mortgage covered these same cattle; that was my understanding at the time. One of those previous mortgages was made on the 31st of October, and the other was made on the 25th of November. I made the contract prior to the 8th of November. I did not sign it until the 9th of November, and the cattle did not get to my place until the 14th.

Examination by the COURT:

I have been in this cattle business about seven years; at the time I commenced I did not have very much estate; I made money out of the cattle. At one time I suppose I was worth nearly $8,000; that was about two or three years ago. I gave Mr. Cox this mortgage in the spring of 1884 for $3,600. I was in very good circumstances. I had given him mortgages ever since I first dealt with him, when he bought out the bank; I think it was in 1881. My estate consisted mostly of cattle. I had cattle that were not covered with mortgages—stock in Southern Missouri, in Polk county. I had cattle over in Ray county. I think I had about 120 in all; the others were in Dade county. I owned those clear; they were three-year old steers, that were worth $40.00 a head; they were in Dade county, near Kansas. I had met with losses between that time and the time I took these cattle from this cattle company—right along about that time. I had lost between $7,000 and $8,000. I did not tell Mr. Cox; I tried to keep it from him, so I could hold my credit and get along. He had no talk with me about my circumstances. I did not even tell my wife. At the time I gave this mortgage to the plaintiff I had about 80 head of cattle, in all, in Missouri. I owned a farm; it was not clear; I had about $2,500 on it. The farm was worth about $5,600. My interest in the farm was about $2,500.

Cross-examination by Mr. McCOY continued:

When I sold my farm every dollar of it was turned in to pay my debts; I never claimed any homestead in it.

Redirect examination:

I could have paid this indebtedness to the Western Land and Cattle Company had this property not been arrested at the stock-yards. If this party that I was owing had not rushed in on me I think I could have paid that debt; that was what I was aiming to do.

Defendant introduces in evidence the certificate made by the recorder of deeds of Caldwell county. The certificate is attached to what purports to be a certified copy of the contract, which has been offered in evidence, showing the place where that instrument was recorded; which certificate is in the following words and figures:

72 STATE OF MISSOURI, } ss:
County of Caldwell, }

I, C. W. M. Love, recorder of deeds in and for said county, hereby certify that the above is a true copy of the original contract between J. W. Moad and Western Land & Cattle Co., as the same appears of record in book 22, at page 129, of deed records in my office. Done at office in Kingston this 26th day of June, 1885.

Witness my hand as recorder and the seal of my office.

[SEAL.] C. W. M. LOVE, *Recorder.*

Defendant rests.

Plaintiff's Rebutting Testimony.

JAMES S. STEVENS:

Have been a commission merchant at the Kansas City stock-yards about seven or eight years. Moad came to Kansas City in 1884, a few days before the Presidential election in October; he wanted to buy cattle; told him we had cattle to sell; said he didn't have any money to buy cattle; told him we had some that I would let out with him to feed. I took him down to Peter Adam's farm, where there was about three hundred cattle belonging to Mr. Forbes. Moad said he had lots of feed; he thought he could take one hundred and fifty through very well. Finally I made a bargain with him that I would put in a bunch of these cattle at four cents a pound, or forty-two dollars a head; there was a certain time set for him to fatten them; they were to be marketed, and all they brought over forty-two dollars a head and twelve per cent. interest went to Mr. Moad for his feeding. I told Moad I could sell the cattle only for money. I said, the way you get these cattle you will have no right to sell or ship any of them. I had let Mr. Monday and one or two other gentlemen have some cattle in the same way, and he had better go to Forbes' office; there were some of the copies of these contracts that had been sold before; all the way I could sell is for cash. Mr. Forbes and Mr. Moad talked there for a few minutes. I don't know what they talked, though.

Q. Now, was there anything said about a guarantee on the cattle?

A. Mr. Moad talked about that. I says these cattle can stay right here for a week or two weeks until you know that they are all right. I think the cattle were to rest there something near two weeks. He came back on the 8th of November. Forbes had the contract all fixed out and Moad signed it and went on down to where
73 the cattle were.

The contract was read over before us all; I think I was a witness to the contract; this is the contract; it is in accordance with the agreement I made with Moad. I was present all the time during the entire interview between Moad and Forbes on that occasion when this contract was executed. We fixed the writings all up and then Mr. Moad started right on for Independence. I saw all the papers that were executed. That contract was drawn. I didn't see any note; no notes were signed or executed at that time; I am sure of that; but Mr. Moad was to have a copy of the contract, and I don't know whether he got that or it was sent to him; I don't know that he got it either. I don't mind whether Moad read the contract or not; I didn't read it, but I heard it read. I found him down where the cattle were the next morning. We counted him off a hundred and fifty cattle and he started with them. The young man that I took up there went along to help on the drove. I told Mr. Moad that he was a good man; that I would have him to take him along with him to help him over the Missouri river; they had to ferry them at Lexington. Mr. Toneyhill, the young man that went down with the cattle, took the eight head to some station on the railroad and then shipped them to Kansas City. Mr. Forbes came down and told me there was eight cattle there that this young man had shipped back, and asked me what I should do with them. I don't remember whether I made that statement to Moad or to Forbes. I am familiar with the shrinkage of cattle in the stock-yards some little; we handle some cattle every day.

Q. Can you give any estimate in pounds as to what would be the deficit in shrinkage if the cattle had proper care by holding over one day?

A. As I tell you, some droves of cattle will weigh more—some five or ten pounds more—and some fifteen less—that is, according to the fill you have on them the first and second day.

Q. From fifty to one hundred pounds less the second day would be an unusual shrinkage, would it not?

A. I should think if they were weighed correctly that would be a very unreasonable shrinkage.

Q. Have you ever known a case where there was a shrinkage of that kind when the cattle were properly handled?

A. Not with a drove of cattle. Sometimes in a big animal—take a big fill of water and weigh and then weigh him over afterwards—it might be that there would be fifty or one hundred pounds difference; these cattle were not of that class. I never saw the cattle after they were turned over to Moad. In shipping they are taken from the cars and put in the yard and rested at Quincy. A great many send them through from Kansas City without any water, but they are fed.

Cross-examination:

I told him he had to bring references that he had lots of feed and was a good, straight man. I required such references, and Forbes got them and claimed they were all satisfactory. Then I let him
74 have cattle to the number of one hundred and fifty head. This was about two weeks or so before he actually took the cattle. I only witnessed one contract or paper. When that paper was executed there Mr. Forbes kept it. Moad was to take these cattle at $42 a head and 12 per cent. interest, and we set the time they were to be marketed for the company; they were to be marketed some time in June; I don't just mind the time or who was to market the cattle.

Q. Do you know whether on the first of June Mr. Forbes, the agent for the plaintiff, went down there for those cattle or did make any attempt to market them?

A. I don't know.

Q. Do you know whether he made any attempt to market the cattle on June 1st?

A. No, sir; I don't reckon he did.

Q. Do you know whether he ever made any attempt to market them until he replevied them?

A. I don't reckon he did; $42 a head was what he was to take the cattle for and 12 per cent. interest, and all over that went to Moad; $2.86 was interest on this $42 from the 8th day of November up to the first day of June. Sometimes you give a man so much for feeding a drove of cattle, so many days by the head; you give him $10 or $15 a head, or you may give him four or six cents a pound. I have put cattle out both ways; I have given men six cents a pound and ten cents a pound. He was to feed according to that paper. I says, These cattle have got to have corn, and you have got to feed these cattle and make them big. He talked about how he could make them weigh 1,500 —. Moad was arrested; I testified against him; I don't know whether he read this contract at the time he signed it; it was read to him, but I don't mind who read the contract. I do not know of my own knowledge how many interviews Moad had with Forbes. Moad said he could bring over good paper showing he was all right, and he showed them to Forbes, and Forbes said he thought it was all satisfactory to let him have the cattle; I had nothing to do with that; I understood at the time where these cattle were to be taken. Moad said he would keep them part of the time in Caldwell and part of the time in Ray county. I let him have them with the understanding that they were to be kept part of the time in Ray county and part of the time in Caldwell county; he lived right along the line; I know there was no note signed in my presence.

ROBERT TONEYHILL.

I first became acquainted with Moad the latter part of January, 1885. Forbes sent me to Moad's place to look after some cattle that Moad had feeding, belonging to Forbes. I was up there, at that

time, about two days. I went to the feed-yard and looked at the cattle and counted them. I had no talk with Moad about the ownership of the cattle, or anything on that subject.

Q. Was there any talk between you and Mr. Moad on the subject of his wanting you to keep quiet about anything?

A. Yes, sir; there was.

Q. What was that?

Objected to by the defendant Cox; objection overruled, and defendant excepts.

A. Mr. Moad told me not to tell any of the neighbors or any of his hired help there about the way he had the cattle; not to tell them that they didn't belong to him; to make it appear they did belong to him.

75 I went back to Moad's place in March, 1885, and was there, except a short time, until the cattle were shipped and taken away; that absence was from about the 10th to the 20th of April. I went back to Moad's place and stayed there until Thursday morning, the 18th day of June, 1885. I told Moad I believed I would go down to Kansas City to-day and come back to-morrow. He said, You tell Forbes that I don't want to ship these cattle until about the 10th of July; Moad said I could stay away a week or such a matter. I told him I didn't want to stay away that long; I would be back in a couple of days. I told him on Monday of the same week that I thought that I would go about Thursday. On Thursday morning when I started he had his team hitched up ready to start away, and he told me he would go down to Black Oak to look after some hogs that were lost; he said nothing about going to Breckenridge that day; this was about a mile and a half from Black Oak. I went back on Saturday morning; I didn't go back Friday; I started Friday but missed the train. I got to Moad's place between five and six o'clock Saturday evening, and I was told that Moad had driven the cattle off on Friday morning to Breckenridge, and had shipped them. I went then to Lexington Junction and went back to Kansas City; I got there Sunday morning; I saw Forbes and informed him that the cattle were gone. Up at Moad's place I was to look after the cattle, to see that they were well fed, plenty of corn and water, and if Moad went to dispose of any of the cattle, or to ship any of them, I was to notify Forbes.

Q. What wages was you to have while you were up to Mr. Moad's place?

Objected to; objection overruled, and defendant excepts.

A. I was to have $35.00 and my board.

Q. What part of that was paid by Mr. Moad?

A. Mr. Moad paid me $15.00, I believe.

Q. That was taken out of what you received from Mr. Forbes, was it?

A. Yes, sir.

Q. You was to get $35.00 a month, and whatever you got from Moad was to be deducted out of what Forbes paid you?

A. Yes, sir; and that was done. It was a very severe storm the Friday morning Moad drove the cattle away.

Moad wanted me to go down to Southwestern Misscuri and look at a lot of cattle, a herd of cattle of 6,000. I believe they were Arkansas cattle, and he wanted them. I told Moad that if he wanted to buy the cattle that he had better go down and look at them himself; that I was working for Forbes, and I don't think that he would be willing for me to go away. Forbes did not know that I was going to Kansas City on this trip; I didn't see him when I was down there Thursday and Friday.

Cross-examination:

Q. You went down there on permission given you by Mr. Moad?

A. No, sir.

76 Q. You didn't go down by permission given you by Mr. Forbes?

A. Oh, yes; I told Mr. Moad I was going.

Q. Did he give you permission to go?

A. He says, All right.

Q. You went down there with permission, didn't you?

A. I don't know how.

Q. You were at work for Mr. Moad, were you not, by the month?

A. Yes, sir; I was feeding cattle for him.

Q. Did Moad know that you were at the same time receiving a salary from Mr. Forbes?

A. Yes, sir.

Q. You told him so, did you?

A. Yes, sir.

Q. You said that he asked you at one time to make no mention of the fact that the cattle were not his?

A. Yes, sir.

Q. Did you observe that request?

A. Yes, sir. I never heard of Mr. Moad mortgaging the cattle or pledging them in any way.

B. F. SMITH.

I live in Caldwell county, Missouri, near Moad's place; known Moad all my life; know Toneyhill when I see him; know Cox; known him personally five or six years. As near as I can remember about it, it was about the last day of October, 1884, that I saw Moad, in the evening, and he asked me when I was going to Kingsson. I says, I am going up to-morrow. He says, I have got or want to get away to-night, and I have some papers that I would like to send up to Cox. He says, "Will you carry them up for me?" I says, "I will." He says, "I will be by your place to-night and I will give them to you." He came up and gave them to me and I carried them up. It was on the Saturday before the Presidential election. I saw those papers when I gave them to Cox. I handed them to him and he tore the envelope off and took them out right before me, and I just noticed the paper. There was a mortgage to Cox; there was a note given to Johnson sent up to be returned to McGaffee;

there was a letter from Moad written that he had given this mortgage stating what he should do with the note; he said that I would take up that mortgage and give you a new one instead; just a few lines wrote—just a slip of paper. I know the fact that Moad had a previous loan from Cox; saw the mortgage in the recorder's office about the 4th day of May, I think, 1884. Me and Cox had a little talk on or about the last of June some time. He was coming back from Moad's place, and I asked him how he was coming out over there, and he says I can't tell; that Moad had $700 or $800 or a $1,000 worth of property there that he could get at. I said, "Is that all the security that you had?" He says, "I had a mortgage on those cattle, but they didn't belong to Moad." He talked as though he thought there would be surplus enough to pay him, but then it would take the cattle to pay the thing out to the cattle company. We talked there a few minutes—not a great while—and he went home. To the best of my knowledge, it was a year ago last fall when Moad first begun in the cattle business. I made a trade myself for the first cattle he handled. It was a very stormy morning—a thunder storm and a heavy rain—the morning when the
77 cattle were driven. I never had any talk with Moad about these cattle until after this thing occurred, or right after. I met him, and I and him talked the thing over. I asked him—I had seen the contract, and I just simply asked him about it, and he said he bought the cattle, and I says, "What have you got that contract there on record for?" He said that contract was simply to secure the company until he went home and borrowed the money to pay for the cattle. I asked him if he did it. He said he had mortgaged the cattle, but didn't pay the company any money. That is about the only conversation. Yes; we have had a little more, but nothing material about it.

Cross-examination:

I saw the contract on record. I didn't see any notes. I happened to see the contract, because I was looking through the record on my own business, and I ran across his mortgage. I read it over three times. I think it was about the first of March, 1885. I had a conversation with Moad about the contract after the cattle were shipped. I told one party, Mr. Davis, about the contract; he came to ask me in reference to some other matters. I would not tell him at first, because I did not want to meddle with other men's business. I didn't tell him until after every body knew it, which was after the cattle were shipped. I was looking over some mortgages that I gave Cox to see if they were cancelled when I found this contract.

J. F. HARWOOD.

I am practicing law in Kansas City, Mo. I am acquainted with Forbes and have met Moad and Cox. After this trouble came up I went to see if the thing could possibly be settled up in some way, intending to see Moad, if possible, and meet Cox on that trip. I saw Moad afterwards. I went into Cox's bank at Kingston, introduced myself to Cox, told him I had come up there representing

this cattle company to find out what claims were up there on these cattle, and I think that I met right at the door of the bank, or right in there, Cox's attorney, McLaughlin. Cox invited me into McLaughlin's office, and I told him I was there just to see what claims were on the cattle. McLaughlin said to Cox, you may just as well tell what your claim is, there may be enough in the thing to pay it. Cox got his papers and said the claim he had was a chattel mortgage that Moad had given him on these cattle and other cattle; the mortgage was for $4,000, securing two notes, one for $366, dated February, 1885, due in 90 days, at ten per cent., the second $3,636.50, dated October 31, 1884, due in 90 days, at ten per cent.; a mortgage on 110 head of cattle and 149 head of one-year-old steers, and bill of sale, dated February 27th, 1885. Cox told me that Moad owed the bank a $1,000 note which was not yet paid, in addition to this $4,100 secured by mortgage. Cox said that Moad told him that the cattle belonged to him (Moad), and he (Cox) let him (Moad) have this money to put into these cattle, and Moad represented he had done so. When I asked Cox how that note came to be dated back to the 31st of October, the year before, how he came to give a mortgage before
78 he got the cattle, Cox said he got the money to put into these cattle, and when he came back he reported to him that he had invested that money in those cattle, and that when he saw him afterwards, after the cattle had been replevied by the cattle company, Moad then told him that instead of putting the money into those cattle, Forbes, the cattle company, or somebody in Kansas City connected with the cattle company—I don't remember which it was—had persuaded him to go into an option deal, and he had lost $3,600, and when he came back he didn't say anything about it, and he had sold these cattle, and was trying to get even with the cattle company for their making him lose the money. The whole talk was about this mortgage, and it was understood that was the only claim he had. Cox said if there was any way of settling the thing he would agree to go into a criminal prosecution and pay part of the fees against Moad. Cox said there had been a good many cattle fed in that part of the country, and it would not do to allow that sort of a thing to go unpunished. People would not come to Caldwell county, and if he could see his way clear of getting his money out he would enter into a criminal prosecution. I was up there a few days after the cattle were replevied here in Chicago. I did not examine the records at Kingston. While in Cox's presence McLaughlin said he had examined the records, and told me about this thing being recorded in the deed-book instead of in the chattel records, and my recollection is that McLaughlin said that was the only thing recorded in that county. I went from there to see Plumb at Breckenridge the day after. I saw those gentlemen at Kingston, and Plumb was talking about having bought 56 head, and having taken charge of the rest for Cox; but in the whole conversation with Plumb he he never alluded to the fact that Cox had ever owned any title; he had charge of the cattle to pay Cox's mortgage debt; that is what Plumb said. I never heard of the Cox bill of sale until last week.

LOUIS R. HASTINGS.

I have been a cattle broker at the stock-yards ever since they were stock-yards; have been in the cattle business since I was 13 years old; am now 55 years old; have done an extensive business; have bought and sold and shipped here and in New York, Buffalo, Albany, and Pittsburgh, and have raised cattle. We handle all classes of cattle. The shrinkage of cattle depends a great deal upon the condition they were weighed in; I am familiar with the shrinkage.

The COURT: These cattle, according to the defendant's proof, were held over one day; they were ready to be sold on Monday, but they were not sold until the next morning. Now, what would be the shrinkage for holding over one day?

A. It would not be but a very little difference—not to exceed 15 or 20 pounds; on feed they will about hold their own.

Which was all the evidence offered by either party upon the trial of said cause.

Whereupon the court, having heard the evidence and being fully advised in the premises, finds the facts in the case as
79 follows:

That on the 8th day of Nov., 1884, the plaintiff owned and possessed 150 head of beef cattle, known as Colorado steers, and on that day plaintiff entered into a written contract with one J. W. Moad, by which Moad was to take the cattle to his farms in Caldwell and Ray counties, Missouri, and there to properly feed, fatten, and care for them until June first, 1885, for the purpose of their being profitably marketed by plaintiff; that Moad waived all liens upon the cattle as an agister or otherwise, and was to receive as his compensation for such feeding all that the cattle should bring over $44.86 per head after deducting cost of marketing; that Moad took the cattle to his father's farm in Caldwell county, Missouri, where they remained some two months, and were then removed to Moad's farm in Ray county, Mo., where they remained until June 19th, 1885, when they were driven to Breckenridge, Mo., to be marketed; that of the 150 head only 135 head were brought into the market at the time, and they are the only cattle covered by the contract to which plaintiff lays any claim in this suit; that Moad had become indebted by various loans to one J. D. Cox, a banker, of Kingston, in Caldwell county, Mo., in an amount of something over $5,000, and had given chattel-mortgage security therefor, but had sold the security without the knowledge of Cox; and about the 27th of February, 1885, Moad gave Cox a chattel mortgage on said cattle; and at about the same time Moad entered into a verbal agreement with Cox that he (Cox) should have the proceeds of the cattle in question to apply on his indebtedness when they were ready for market; but no record of this mortgage or of this verbal arrangement was made in the counties where the cattle were kept; that the contract between the plaintiff and Moad was never recorded in Ray county, but was recorded in January, 1885, in the office of the recorder of Caldwell

Co., but, by a mistake of the recorder, it was spread of record in the real estate record instead of the book of chattel mortgages; that on the 19th day of June, 1885, said 135 head of cattle were disposed of by Moad in the following manner: Fifty-six head were sold to Plumb, that being the number on which the Breckenridge Savings Bank held a chattel mortgage, and the other seventy-nine head were delivered to Plumb to ship into the Chicago market and then sell for the use of Cox; that this shipping arrangement was made between Moad and Cox on said 19th day of June by the use of the telegraph, and the cattle were actually shipped in that manner in the evening of that day; that the cattle were unloaded while in transit, and rested and fed for one day at Quincy, and were delivered upon the stock-yards at Chicago on the morning of the 22d day of June, 1885, and were replevied by plaintiff on the same day; that the plaintiff caused the cattle to be sold at the said stock-yards on the day following, and the 79 head in question weighed 95,320 pounds and sold at $5.10 per hundred pounds, excepting one steer, and were sold for the sum in the aggregate of $4,850.40, and that after deducting the cost of marketing said cattle the net proceeds of 79 head were $4,526,15; that neither Cox nor his bank paid any present
80 consideration nor gave Moad any credit upon the faith of his being the owner of the cattle, and he was not a *bona fide* purchaser or creditor for value, and that the issues of fact and law are with the plaintiff and are found in its favor.

To which finding of facts and each thereof the defendant then and there duly accepted.

And thereupon the defendant moved the court to set aside said findings and to grant a new trial, because—

1. The court admitted and took into consideration improper evidence on behalf of plaintiff.
2. The findings of the court are not supported by the evidence.
3. The evidence preponderates in favor of the defendant.
4. The findings are contrary to the law.
5. The findings were otherwise irregular.

But the court overruled said motion; to which ruling of the court the defendant excepted.

And thereupon the court found the law with the plaintiff. It is therefore considered that the plaintiff was at the time of the suing out of the writ of replevin herein the owner of the property replevied and was entitled to the possession of the same, and to this finding and judgment of the court the defendant then excepted.

The foregoing facts being found by the court, the defendant excepts to the conclusions of law by the court on said facts.

And forasmuch as the matters contained in this bill of exceptions do not otherwise appear of record, the defendant comes and prays that the same may be signed by said court, which is accordingly done; but this bill of exceptions is allowed without prejudice

to the right of the plaintiff to object to the jurisdictiou of the Supreme Court on writ of error.

H. W. BLODGETT, *Judge.* [SEAL.]

Endorsed: Filed May 24, 1886. Wm. H. Bradley, clerk.

81 Afterwards, to wit, on the twenty-ninth day of May, 1886, came the defendant, James D. Cox, by his attorney, and filed in said clerk's office his motion for a new trial in said entitled cause; which said motion is in the words and figures following, to wit:

82 *Motion for New Trial.*

In the Circuit Court of the United States for the Northern District of Illinois.

WESTERN LAND AND CATTLE COMPANY
v.
J. W. PLUMB, JAMES W. MOAD, UNION STOCK-YARDS AND TRANSIT Company, Robert Strahorn, Frank Q. Baker, Jesse Sherwood, and James D. Cox.

And now comes the said defendant, James D. Cox, and moves the court to set aside its findings & judgments heretofore made and entered herein in said cause and to grant a new trial for the following reasons:

First. That the court admitted and took into account improper evidence on behalf of the plaintiff.

Second. That the findings of the court are not supported by the evidence.

Third. That the evidence preponderates in favor of the defendant, James D. Cox.

Fourth. That the findings were contrary to the law.

83 Fifth. That the findings were otherwise irregular.

Wherefore the said defendant, James D. Cox, prays that said findings may be set aside and a new trial of said cause granted.

R. A. CHILDS,
Att'y for Defendant Cox.

(Endorsed:) Filed May 29, 1886. W. H. Bradley, clerk.

Afterwards, to wit, on the twenty-eighth day of June, in the adjourned May term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE WESTERN LAND AND CATTLE CO. *vs.* J. W. PLUMB *et al.*

Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendant, James D. Cox, for a new trial herein, and, after hearing the arguments of the counsel, the court takes the same under advisement.

84 Afterwards, to wit, on the sixth day of July, in the July term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE WESTERN LAND AND CATTLE COMPANY

vs.

JAMES W. PLUMB *et al*

Replevin.

The court having considered and being now fully advised upon the motion of the defendant, James D. Cox, for a new trial of this cause, overrules the same; and, on motion of said defendant, by his attorney, the time is extended thirty days in which to file a bill of exceptions herein.

85 And afterwards, to wit, on the twenty-ninth day of July, A. D. 1886, a bond was filed in said clerk's office in said cause; which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, James D. Cox, principal, and Robert A. Childs, surety, are held and firmly bound unto the Western Land and Cattle Company in the full and just sum of one thousand —, to be paid to the said Western Land and Cattle Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of July, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately at a term of the United States circuit court for the northern district of Illinois, in a suit depending in said court between The Western Land and Cattle Co., Limited, plaintiff, and J. D. Cox *et al.*, defendants, a certain judgment in replevin was rendered in favor of the plaintiff and against the said defendant-, James D. Cox & others, and the said James D. Cox having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Western Land and Cattle Company (Limited), citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

86 Now, the condition of the above obligation is such that if the said James D. Cox shall prosecute his writ of error to effect and answer all costs if he fail to make his plea good,

then the above obligation to be void; else to remain in full force and virtue.

JAMES D. COX, [SEAL.]
By ROBERT A. CHILDS,
His Attorney-in-Fact.
ROBERT A. CHILDS. [SEAL.]

Approved, writ of error not to operate as a supersedeas.
H. W. BLODGETT, *Judge.*

Endorsed: Filed July 29, 1886. W. H. Bradley, cl'k.

87 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein The Western Land and Cattle Company, Limited, is the plaintiff and James W. Plumb, James W. Moad, James D. Cox, The Union Stock-Yards and Transit Company, and Jesse Sherwood are the defendants, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this thirtieth day of September, 1886.

[Seal of Circuit Court U. S., Northern Dist. Illinois. 1855.]

WM. H. BRADLEY, *Clerk.*

88 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between The Western Land and Cattle Company (Limited), plaintiff, and J. W. Plumb *et al.*, defendants, in an action of replevin, a manifest error hath happened, to the great damage of J. D. Cox, one of the defendants, as by his complaint appears, and it *is* being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1886, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-ninth day of July, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the 111th year.

[Seal of Circuit Court U. S., Northern Dist. Illinois. 1855.]

WM. H. BRADLEY, *Clerk.*

[Endorsed:] Supreme Court of the United States. J. D. Cox, plaintiff in error, *vs.* Western Land and Cattle Co., Limited, def'ts in error. Writ of error. Copy deposited for the defendant in error in the clerk's office U. S., northern district of Illinois.

89 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

To Western Land and Cattle Company (Limited), Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1886, pursuant to an writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein J. D. Cox, impleaded with J. W. Plumb *et al.* —, to show cause, if any there be, why the record mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, judge of the district court, this 29th day of July, in the year of our Lord one thousand eight hundred and eighty-six, without prejudice as to whether case is reviewable.

H. W. BLODGETT, *Judge.*

UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

Robert A. Childs, being duly sworn, on oath says that he served the foregoing citation on McCoy, Pope & McCoy, who are attorneys for the plaintiff, by delivering to them a true copy hereof *to them*, this 29th day of July, 1886, at the city of Chicago, in said district.

ROBERT A. CHILDS.

Subscribed & sworn to before me this 29th day of July, 1886.

WM. H. BRADLEY, *Clerk.*

90 [Endorsed:] Supreme Court of the United States. Western Land and Cattle Company, Limited, *vs.* James D. Cox, impleaded, &c. Citation to October term, A. D. 18—.

Endorsed on cover: N. Illinois C. C. U. S. No. 1101. J. D. Cox, plaintiff in error, *vs.* The Western Land and Cattle Company (Limited). Filed October 9, 1886.

123-375

Office Supreme Court U. S.
FILED.
OCT 13 1887
JAMES. H. McKENNEY.
CLERK.

(Copy)

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1886. 7.

No. 1101.

J. D. COX,
Plaintiff in Error,
vs.
THE WESTERN LAND AND CATTLE COMPANY, (LIMITED),
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR FOR WANT OF JURISDICTION, **ARGUMENT** IN SUPPORT OF SAID MOTION, AND **NOTICE** OF SAID MOTION, AND **SERVICE** OF SAID NOTICE.

ALEXANDER McCOY,
FOR DEFENDANT IN ERROR.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO.

IN THE

UNITED STATES SUPREME COURT,

OCTOBER TERM, A. D. 1886.7.

No. 1101.

J. D. COX,
Plaintiff in Error,
vs.
THE WESTERN LAND AND CATTLE COMPANY, (LIMITED),
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

MOTION

OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR FOR WANT OF JURISDICTION.

And now comes the Western Land and Cattle Company, limited, defendant in error, by Alexander McCoy, its attorney, and moves the court to dismiss the writ of error of said plaintiff in error, upon the ground that the amount in controversy in said cause exclusive of costs, is less than five thousand dollars (the actual amount in controversy being only $\$4,526\frac{15}{100}$), and in support of said motion submits to your Honors the annexed argument.

ALEXANDER McCOY,
Attorney for Defendant in Error.

IN THE

UNITED STATES SUPREME COURT,

OCTOBER TERM, A. D. 1886.

No. 1101.

J. D. COX,
Plaintiff in Error,
vs.
THE WESTERN LAND AND CATTLE COMPANY, (LIMITED),
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENTS

IN SUPPORT OF MOTION BY DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR FOR WANT OF JURISDICTION.

MAY IT PLEASE THE COURT:

This suit was an action of replevin brought in the federal Circuit court by defendant in error against plaintiff in error and other parties. By stipulation the suit was tried in the Circuit court without the intervention of a jury, and a special finding of facts is contained in the record. (Page 52.)

I.

THE CONTROVERSY.

Briefly stated the facts pertinent to this motion are as follows: Defendant in error, being a cattle grower, on November 8, 1884, placed 150 head of its cattle in charge of one J. W. Moad of Caldwell county, Missouri, as an agister of cattle, according to the terms of a written feeding contract. (Rec., 25.)

Of these 150 cattle fifteen head were disposed of in Missouri, and have no connection with this case. (Rec., 33.) The remaining 135 head were, on June 19, 1885, shipped to Chicago in charge of one J. W. Plumb, for market, Plumb claiming to own fifty-six head of them by purchase from Moad, the agister, and that the other seventy-nine head were in his charge for plaintiff in error, J. D. Cox, who also claimed, by purchase or mortgage from Moad. On June 22, 1885, the 135 head were taken by defendant in error at the Chicago Union Stock Yards under the replevin writ in this cause. Cox, the plaintiff in error, Plumb, the shipper, Moad, the agister, the stock yards company, and a commission firm who had the cattle for sale, being made defendants. All these defendants made default save Cox and Plumb, who filed pleas.

Cox, plaintiff in error, by his third plea (Rec., 10) sets up claim and ownership in himself to seventy-nine head, and in Plumb to the remaining fifty-six head of the cattle. Plumb's third plea is a duplicate of that filed by Cox. (Rec., 8.) All other pleas were merely formal. The controversies, therefore, under the issues made by the pleadings, were between the cattle company and Cox

as to seventy-nine head, and between the cattle company and Plumb as to the other fifty-six head.

The bill of exceptions (Rec., 32, 33) sets forth that "It was admitted for the purposes of this trial * * * "that a settlement had been made between plaintiff "(below) and Plumb in regard to the fifty-six head "which were claimed by Plumb, so that the controversy "remaining to be tried is in regard to the seventy-nine "head claimed by Cox."

The Circuit court, as a part of its special findings of facts, finds (Rec., 53): "That the plaintiff caused the "cattle to be sold at the said (Chicago Union) Stock "Yards on the day following (June 23, 1885), and the "seventy-nine head in question weighed 95,320 pounds "and sold at $5.10 per hundred pounds, excepting one "steer, and were sold for the sum in the aggregate of "$4,850.40, and that after deducting the cost of market-"ing said cattle, the net proceeds of the seventy-nine head "were $4,526.15."

As we understand the law this finding of facts is conclusive. In *Insurance Company* v. *Folsom*, 18 Wall., 237, this court has said: "Propositions of fact found by the "court, in the case where the trial by jury is waived as "provided in the act of Congress, are equivalent to a "special verdict, and the Supreme court will not examine "the evidence on which the finding is founded, as the act "of Congress contemplates that the finding shall be by "the Circuit court. * * * And it is equally "clear that the findings of the Circuit court, even when "special cannot be reviewed by the Supreme court, "except for the purpose of determining whether the facts "found are sufficient to support the judgment."

Should this court have any doubt as to said sum of $4,526.15, net proceeds of sale, being the actual value of the cattle in controversy, we will refer to sufficient of the record to settle the matter beyond question. The copy of the account sales of the seventy-nine head (Rec., 39) shows that the charges deducted from the gross proceeds were simply the freight, feed, yardage and commission for selling, all of which were a lien on the cattle, and must have been paid in any event before the cattle could be removed or anything realized therefrom. These charges were not in controversy. As the Circuit court found they were "the cost of marketing said cattle," and the controversy was confined to the value of the cattle, after deducting the cost of marketing.

There was no contention but what the selling price was the fair value of the cattle at the time of sale. They were sold by commission merchants, in the ordinary course of trade in the principal cattle market of the world, the market selected by plaintiff in error, and no better test of value could have been applied.

We are unable to find anything in the record which would form a basis for any greater valuation, unless it was some testimony of Plumb, the shipper (Rec., 38), to the effect, that the cattle might have weighed more on the morning of their arrival at the stock yards, by reason of their having been starved for want of water during three days shipment, and then being allowed to drink largely just before he expected to weigh them, than they did weigh when sold the next morning. This testimony is considered in the opinion of the Circuit court on the lower half of page 19 of the record. We do not think it merits serious consideration on this motion, as the court should take official cognizance of the

fact that "*watering stock*" is contrary to law, and the "*waterer*" should not be allowed to claim in right of his own wrong. The well known Wall street phrase, used in connection with corporate stocks, originated with the cattle-men, and characterized this class of transactions.

The testimony of Mr. Hastings (Rec., 52), and Mr. Stevens (Rec., 46), shows that the shrinkage in cattle by holding over one day in the stock yards, would not exceed ten to fifteen pounds per head, at the outside, and even Plumb's estimate of fifty or even 100 pounds per head would not bring the sum total up to $5,000. We will not pursue the subject farther.

II.

THE FORM OF THE JUDGMENT.

It may be argued that because the judgment (Rec., 20) finds the property in the plaintiff as to the entire 135 head, with a total net valuation of $7,761.40 (Rec., 39), this court will take jurisdiction, but the law is otherwise. In the case of *Tintsman* v. *National Bank*, 100 U. S., 6, the court held that although the judgment was for over $8,000, yet as an inspection of the whole record disclosed the fact that the only controversy with the defendant (who was there plaintiff in error), was concerning the sum of $3,124.20, the court had no jurisdiction.

Pierce v. *Wade*, 100 U. S., 444, was a replevin suit for Texas cattle, and where the value of all the cattle taken and covered by the judgment seems to have exceeded $5,000; yet, as the matter in dispute on the appeal only involved sixty-two head, valued at $1,400, the court declined to take jurisdiction.

The case of *Hilton* v. *Dickinson*, 108 U. S., 165, where all the authorities on this subject are reviewed and classified, leaves no room for doubt that where by an inspection of the entire record it clearly appears that the amount in controversy, *in so far as it affects the party prosecuting the writ of error* is concerned, is less than the jurisdictional amount, the court will dismiss the writ on its own motion, without regard to the apparent amount of the judgment.

Indeed, according to this last authority, the present case could not have been entertained by this court, even had no settlement been made with Plumb as to the fifty-six head, for the claims asserted by Cox and Plumb were not joint, but several, and neither one involved $5,000.

All of which is respectfully submitted.

A. McCoy,
Attorney for Defendant in Error.

IN THE

UNITED STATES SUPREME COURT,

OCTOBER TERM, A. D. 1886.

No. 1101.

J. D. COX,
Plaintiff in Error,
vs.
THE WESTERN LAND AND CATTLE COMPANY, (LIMITED),
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

NOTICE

OF MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR FOR WANT OF JURISDICTION.

To GEN. GEORGE W. SMITH,
Attorney of record for Plaintiff in Error:

YOU ARE HEREBY NOTIFIED

That I will immediately hereafter, by due course of mail, file in said cause in the Supreme court of the United States the foregoing motion and argument in support thereof, and that on Monday, ~~May 30,~~ October 31st 1887, at the opening of said court, or so soon thereafter as said motion can be heard, I shall submit said motion and argument to said court, at which time and place you can appear and oppose said motion if you see fit.

Very respectfully yours,
ALEXANDER MCCOY,
Attorney for Defendant in Error.

Received a copy of the foregoing motion, argument, and notice at Chicago, Illinois, this 10th day of October A. D. 1887.

(signed) Geo. W. Smith
Attorney for Plaintiff in Error.

123-375

Supreme Court U. S.
FILED
NOV 14 1887
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1887.

No. 714.

J. D. COX,
Plaintiff in Error,
vs.
THE WESTERN LAND AND CATTLE COMPANY (LIMITED),
Defendant in Error.

Error to the United States Circuit Court, for the Northern District of Illinois.

IN REPLY

TO THE MOTION OF DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION.

R. A. CHILDS,
ATTORNEY FOR DEFENDANT IN ERROR.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO.

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MAY IT PLEASE THE COURT:

You are asked to dismiss the writ presumably because the amount in controversy is not in excess of $5,000, exclusive of costs, although the motion is not stated in that way.

The action being in replevin, the only questions to be considered on this motion will be, *First*, what property is in controversy? And, *Second*, what was its value at the time of the seizure under the writ of replevin?

Believing it will readily appear to the court that no just disposition can be made of this cause short of a full re-

view of the record, no more will be here said than sufficient to indicate the bearing of the record upon the above questions.

I.

The plaintiff in error, J. D. Cox, was doing a banking business at Kingston, the county seat of Caldwell county, in the State of Missouri, and in February, 1885, one J. W. Moad, a cattle dealer in that vicinity, and a patron of the bank, had become indebted to the bank for moneys advanced in an amount of something over $5,000. (Rec., 52.) This is not controverted.

To secure the payment of this debt Moad agreed with Cox to turn over to him a portion of a herd of cattle (Rec., 4) which he owned and was then feeding on his farm in the adjoining county of Ray, the balance of the herd having been pledged to secure an indebtedness to another bank at Breckenridge in said Caldwell county. (Rec., 52, 33.)

This agreement was verbal and to the effect that when the cattle were ready for the market they should be delivered to Cox. (Rec., 40, 41, 52, 33.)

At the time of this transaction, and for years prior thereto, the statute book of Missouri had, among its general provisions the following:

"*Sec. 2507 Rev. Code, Mo. Conditional sales void as to "creditors unless recorded.*

"In all cases where any personal property shall be * * * delivered to another on condition that the same "shall belong to the person * * * receiving the

"same whenever the amount paid shall be a certain sum "* * * the title to the same to remain in the deliv- "erer of the same, until such sum * * * shall have "been paid, such condition, in regard to the title so re- "maining until such payment, shall be void as to all sub- "sequent purchasers in good faith, and creditors, unless "such condition shall be evidenced by writing, executed, "acknowledged, and recorded, as provided in cases of "mortgages of personal property."

Cox caused search to be made in the records of said Caldwell and Ray counties, in all places where any such claims, liens or interests, as contemplated in said statute, might properly be recorded, and, finding none, accepted the cattle as security, and to be delivered as above stated, and the cattle were actually delivered on that agreement as hereinafter shown.

The first question is to be at once disposed of by conceding that the controversy is alone with reference to the seventy-nine head of cattle claimed by Cox.

II.

The only question now remaining on this motion is what was their value at the instant of the seizure under the replevin writ.

The time of the seizure was Monday, the 22d day of June, 1885, at about 9 o'clock in the forenoon. (Rec. 37, bottom of page.)

The place of the seizure was in the marketing and feeding pens in the Union Stock Yards in Chicago. (Rec. 38.)

The cattle were in the possession of Messrs. Strahorn & Co., the agents and consignees of J. D. Cox. (Rec. 37.)

The condition of the cattle was that they had just arrived upon the yards early that morning and had been rested, fed and watered, and were in the market at the most advantageous hour in the day and the most advantageous day in the week; and that the cattle were in the most favorable condition to be marketed and were then just upon the point of being sold when seized. (Rec., 37, 38.)

Now, the value of these cattle is the price for which they would have sold at the time of seizure, and they were then immediately upon sale.

It would be here sufficient argument to suggest that defendant in error, by his own wrongful act, prevented plaintiff in error from determining the then present value of the cattle by stopping the sale and driving them away. A price obtained for the cattle when the market was in a less favorable condition, or when the cattle were in less favorable condition for marketing, would be no criterion for determining the value of the cattle at the time of the seizure for the purposes of this motion.

The least defendant in error could have done, having taken the cattle, would have been to furnish evidence of the value at the time of the seizure, but such evidence was not furnished by it upon the trial.

The cattle were not sold until more than one day after they were seized. (*Rec., 37, bottom of page, and 38, top of page;* also 53.) The defendant in error has offered no proof to show in what manner it kept the cattle in the meantime.

It is submitted that the defendant in error is not in a

position to question the jurisdiction of this court to review this case.

Counsel has said, in support of this motion, that the seventy-nine head of cattle were sold by defendant in error a day or so after their seizure for the *gross* sum of $4,850.40 (Rec., 39), and that the net proceeds is $4,526.15, and it is true that the trial court so found in its special finding of facts (Rec., 53), and counsel insists that said latter sum is the amount in controversy.

The court found what the plaintiff in the replevin suit sold the cattle for and what charges it paid and nothing more. It neither found, nor undertook to find, the value of the cattle at the time of the seizure—and neither the amount for which the cattle sold nor the net proceeds of the sale is the amount in controversy, unless it is further true that property may be replevied and sold by the plaintiff for any fraction of its value and the plaintiff will be accountable only for net proceeds without reference to the actual value of the property at the time of the seizure. Such is not the law.

But the record shows by positive proof made by plaintiff in error upon the trial, that the cattle in question were of more than sufficient value at the time of seizure to give this court jurisdiction of the writ.

James W. Plumb, whose testimony is reported at pages *37* and *38* of the printed record, knew the cattle thoroughly. He was a dealer in stock, and had handled that kind of cattle for years. He had no interest whatever in the result of the suit, for his claim for the fifty-six head had been satisfied long prior to the trial. He went with these identical cattle from Breckenridge, Missouri, to Chicago, and had them in the best condition for the market when they were seized. He knew when the cattle

were sold, and the treatment they had received in the meantime, and he said they *would not weigh as much when marketed into fifty to one hundred pounds per head as when seized;* and that he makes the estimate from actually weighing and handling that kind of cattle. (Rec., 38.)

Take, then, the lowest figure here given; say, fifty pounds per head, and the loss on the seventy-nine head by the shrinkage was 3,950 pounds. The cattle, when sold, weighed 95,320 pounds. By this testimony, therefore, the total weight at the time of the seizure was:

Weight when sold	95,320
Minimum shrinkage in weight by holding over	3,950
Total weight when seized	99,270

The price at which the cattle were sold was $5.10 per hundred. Hence $\frac{99270}{100}=992\frac{70}{100}$ cwt. $\times$ $5.10=$5,062.77, the value of the cattle, if the market had been both days the same, but Plumb says the market on Tuesday, at the time of the sale, was ten cents a hundred lower than on Monday, when the cattle should have been sold. (Rec., 38.) Besides, they were then *stale* cattle in the market, and were so regarded after they had laid over. (Rec., 38.)

Now, without reference to the fact that these cattle had grown stale in the market, but estimating the market as ten cents per hundred higher at the time of the seizure than at the time of the sale, and we shall have the additional value in those cattle at the time of seizure of 992.7 $\times$.10 = $99.27, or $5,062.77 + 99.27 = $5,152.04. Plumb was the only witness who pretended to know anything about these cattle or as to the relative condition of the market on the two days, and therefore his is the only testimony of value in these respects.

The remark of counsel in closing his first point at page 7 of his brief is not understood. And, in this connection, I must notice the manner in which counsel has facetiously enlightened your Honors on the origin of the expression "*watering of stock*," and his reference in that connection to the character of the testimony of the witness Plumb. See bottom of page 6 of brief in support of motion. Here the court refers, in his opinion, to Plumb's unscrupulous practices in starving the cattle for water. Here I insist, with deference, that the trial court wholly misunderstood this witness. There was and is no syllable of testimony in the record that Plumb ever practiced or did any thing of the kind. He testified he had accompanied the cattle into the market and had, at Quincy, unloaded, rested, fed and watered the cattle, and that they had fed and watered them immediately upon unloading them at the stock yards in Chicago. (*See testimony of Plum, Rec., 37, 38.*)

The second point in the argument in support of the motion is not a question upon this motion, and therefore the three authorities there cited are not in point on that side.

If *Insurance Company* v. *Folsom*, 18 Wall., 237, does hold that the finding of the special fact as recited at page 53 of the record is conclusive, as claimed by counsel in support of the motion, what are the facts concluded? Why, that on June 23, 1885, the cattle weighed 95,320 pounds and sold at $5.10 per hundred pounds, or, in the aggregate, $4,850.40; and that sum was reduced to $4,526.15 by charges; but it does not find that the weight and the value per hundred weight at the time of the seizure were not as above stated by Plump, and there is no testimony in the record to color or contravene it.

It should also be borne in mind that Cox never authorized the payment of any charges out of the proceeds of the cattle, nor that he had not himself provided for all charges of marketing the cattle.

The decision in this case should be reviewed and not dismissed hence, for Cox's claim *was* in excess of $5,000, and the cattle had been delivered into his hands in payment of the claim, and the value of the cattle thus delivered was in excess of $5,000, as above demonstrated.

Upon the whole record it will be seen, upon careful inquiry, that *as between the parties in this court*, the law is wholly with the plaintiff in error.

There arises the question of construction of certain registry laws of the State of Missouri and the effect upon creditors and innocent purchasers where constructive notice has not been created by the due observance of the registry laws.

The circumstances of this case are peculiarly such that if the judgment of the Circuit court shall stand, Cox will be compelled to lose his money, but if reversed, the cattle company has remedies that will preserve it, and neither party will meet with loss.

In *Hilton* v. *Dickinson*, 108 U. S., 165, this court has said:

"We have jurisdiction of a writ of error or appeal by "a defendant when the recovery against him is as much "in amount or value as is required to bring a case here."

It is respectfully submitted that this court may and will retain jurisdiction to review this cause.

R. A. CHILDS,
Attorney for Defendant in Error.